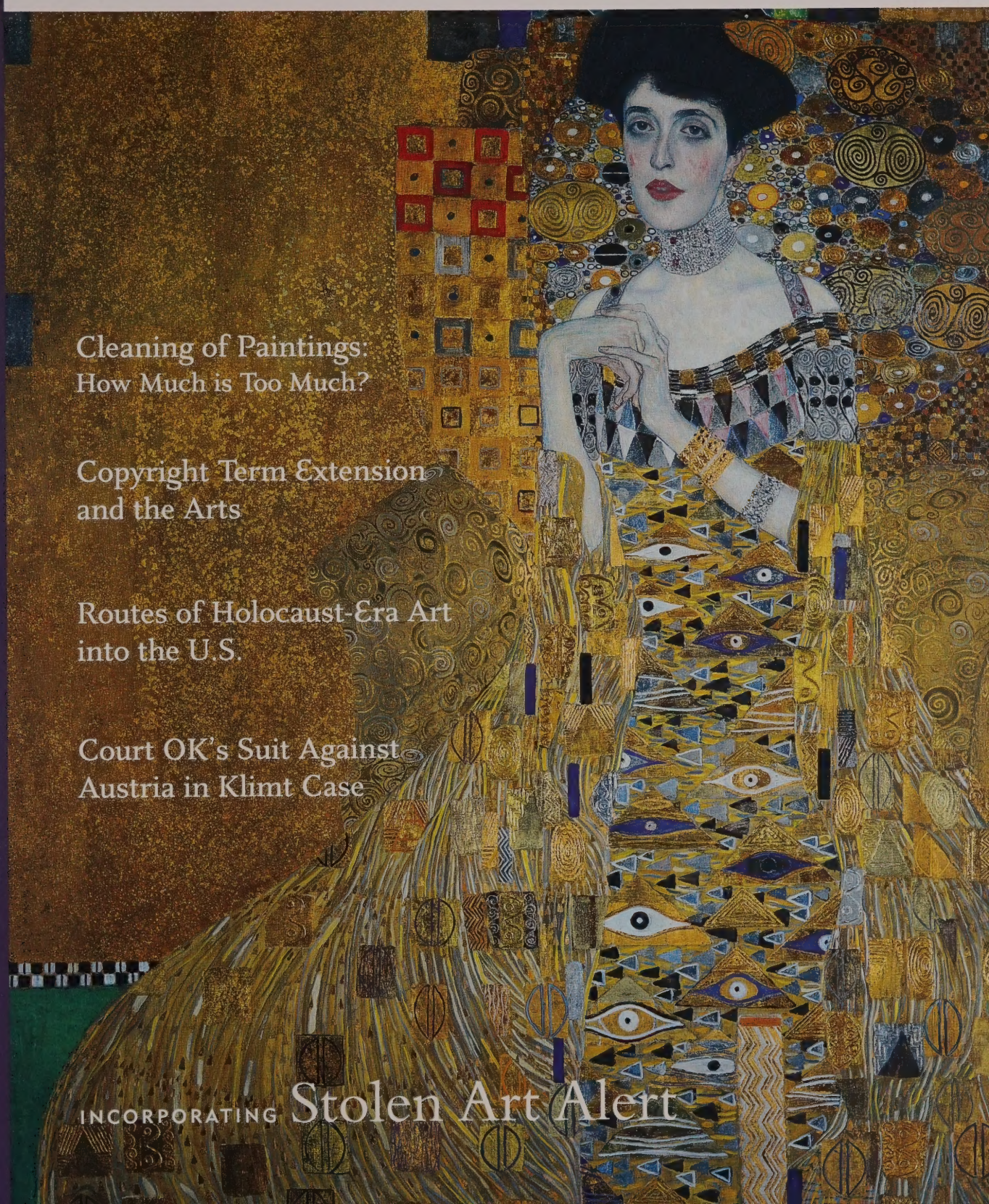
VOLUME 5 NUMBER 3 2002

IFAR Journal

INTERNATIONAL FOUNDATION FOR ART RESEARCH



Cleaning of Paintings:
How Much is Too Much?

Copyright Term Extension
and the Arts

Routes of Holocaust-Era Art
into the U.S.

Court OK's Suit Against
Austria in Klimt Case

INCORPORATING Stolen Art Alert

IFAR *Journal*, ISSN 1098–1195, is published quarterly by the International Foundation for Art Research, Inc., 500 Fifth Avenue, Suite 1234, New York, NY 10110. Subscription rates are $65 per year. periodicals postage paid at New York, NY 10036 and at additional mailing offices. **POSTMASTER:** Send address changes to the International Foundation for Art Research, Inc., 500 Fifth Avenue, Suite 1234, New York, NY 10110.

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Editor in Chief: Sharon Flescher
Editor: Kathleen Ferguson
Design: Allison Henry

International Foundation for Art Research (IFAR)
500 Fifth Avenue, Suite 1234, New York, NY 10110
Tel: (212) 391-6234 Fax: (212) 391-8794 www.ifar.org

Executive Director: Sharon Flescher
Assistant to the Director: Kathleen Ferguson
Special Research Associate: Gertrude Wilmers
Consultant, Authentication Service: Virgilia Pancoast Klein

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IFAR WISHES TO ACKNOWLEDGE THE INTERNATIONAL MUSIC AND ART FOUNDATION, THE LIMAN FOUNDATION AND THE EUGENE V. AND CLARE E. THAW CHARITABLE TRUST FOR THEIR GENEROUS GRANTS IN PARTIAL SUPPORT OF *IFAR Journal*.

IFAR Journal

INTERNATIONAL FOUNDATION FOR ART RESEARCH

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COVER: GUSTAV KLIMT (1862–1918). *Adele Bloch-Bauer I* (cropped), 1907. o/c. 138 x 138 cm. Copyright Erich Lessing/Art Resource, N.Y. Oesterreichische Galerie, Vienna, Austria. See story on p. 2, this issue.

CALIFORNIA APPEALS COURT GIVES GREEN LIGHT TO SUIT AGAINST AUSTRIA

AUSTRIA FILES PETITION FOR REHEARING

AT ISSUE: OWNERSHIP DISPUTE OVER 6 KLIMTS

A California federal appeals court has ruled unanimously (3–0) that California resident Maria Altmann can proceed with her suit against the government of Austria to reclaim six paintings by Gustav Klimt that belonged to her family before World War II. (*Altmann v. Republic of Austria* 02.C.D.O.S.)

On December 12, a three–judge panel of the Ninth Circuit Court of Appeals agreed with the lower district court that the 1976 U.S. Foreign Sovereign Immunity Act did not block the suit from going forward in the United States. This would be the first time that a foreign government would be allowed to be sued in the U.S. in a Holocaust-related art restitution case.

Austria is expected to appeal to the U.S. Supreme Court. But first, it has filed a petition for rehearing *en banc*, that is, by the full Ninth Circuit, not just the three-judge panel. Austria contends that the suit is an insult to its sovereignty and that the U.S. is an improper venue (*forum non conveniens*), that the paintings and all witnesses are in Austria, and that applicable laws should be those of Austria.

"Austria has contended that the suit is an insult to its sovereignty..."

As IFAR went to press, the U.S. Justice Department announced its intention to file a brief in support of Austria's petition for a rehearing *en banc*.

For purposes of the appeal, which addressed jurisdictional and procedural issues, the court assumed that all the "factual allegations in [Mrs. Altmann's] complaint were true." The validity of the allegations will be determined in a trial if the suit goes forward. The appeals court did find, however, that the complaint was "substantial and non-frivolous."

At issue, and as described previously by IFAR (see *IFAR Journal*, Vol 4, no. 4/Vol. 5, no. 1, pp. 5–6; and Vol. 5, no. 2, p. 4), are six valuable paintings by Austrian artist Klimt that are currently in the Austrian National Gallery in Vienna (Figs. 1 & 2 and *Journal* cover). The paintings were the property of

FIGURE 1. Gustav Klimt (1862–1918). *Adele Bloch-Bauer II.* Oil on canvas, 1912. Copyright Erich Lessing/Art Resource, NY. Oesterreichische Galerie, Vienna, Austria.

Mrs. Altmann's uncle, Ferdinand Bloch-Bauer, a Jewish sugar magnate who lived in Vienna. He was also an art collector and patron of Klimt. After Nazi control of Austria in 1938, he was forced to flee the country, leaving his mansion and art collection, which were confiscated and divided up.

CLASH OF LEGAL WILLS

Bloch-Bauer died in Zurich in 1945. His wife Adele (subject of two of the Klimt paintings) had died in 1925. Her will directed that the six Klimt paintings go to the Austrian government upon Ferdinand's death. But that was many years before the Nazis came to power. One of the issues to be decided at trial is whether Adele's request had the binding force of a bequest, as the Austrian government claims, or was simply a "request," invalidated by the intervening events of the Holocaust and Ferdinand's own will, which specifically revoked all previous wills.

Ferdinand bequeathed everything to his one nephew and two nieces. Mrs. Altmann, now 86 years old, a resident of California and a U.S. citizen since 1945, is the only one of the three still alive. She, too, fled Vienna. She is not, however, the only heir. In fact, she is heir to only 25 percent of her uncle's estate. But for purposes of this lawsuit, the appeals court noted, "her relatives have assigned to her an additional fifty percent of their interest. . . . Another relative, Altmann's cousin, who holds the remaining 25 percent," doesn't live in the U.S., but is aware of the litigation. For this reason, the appeals court rejected Austria's request to dismiss the case based on the grounds that not all the co-heirs were party to the litigation.

After WWII, a new government took over in Austria. In 1946 it declared Nazi transactions void. Nonetheless, the Bloch-Bauer family was unsuccessful at the time in reclaiming the Klimt paintings. The 1946 law will be one of the issues if the case goes to trial.

IS AUSTRIA IMMUNE?

Although the Foreign Sovereign Immunities Act of 1976 makes foreign governments immune from lawsuits in the United States, the appeals court affirmed the lower California court ruling that the case met the specific exceptions enumerated in the Act that allow such cases to go forward. Namely: that, if the facts were as alleged, the case was "not frivolous"; that the paintings were taken "in violation of international law"; and that the Austrian government engages in commercial activities in the U.S. (by, for example, publishing guide books in English for the American market; by publishing a Yale University Press book on *Klimt's Women* for the Austrian National Gallery; and by maintaining Consulates in the U.S., including one in Los Angeles).

The appeals court was less sympathetic to Mrs. Altmann's claim that the expense of bringing a lawsuit in Austria was grounds for suing in the U.S. Under the civil law of Austria (and several other countries), plaintiffs must post a filing fee to bring a suit. The fee is based on the value of the contested items. The paintings in this case have an estimated value of $135 million. The normal Austrian formula requires a 1.2% fee plus several thousand Austrian shillings (a total of $1.6 million). The Austrian government reduced the fee to $135,000 when Mrs. Altmann requested a waiver.

The California circuit court found the fee reasonable. It noted that not only had the Austrian government significantly reduced the standard amount to accommodate Altmann, but the value of Altmann's home wasn't taken into account, nor was the "value of a number of porcelain pieces [already] returned to her by the Austrian government [worth almost $700,000]." Arguably, the decision noted, "Altmann has greater assets available to her than she listed in her application to the court."

The court also did not accept Altmann's argument that the Austrian 30–year Statute of Limitations would have barred her claim. It noted that that statute does not come into effect (it is tolled) if "fraudulent concealment" is involved, as Altmann's suit claims it is.

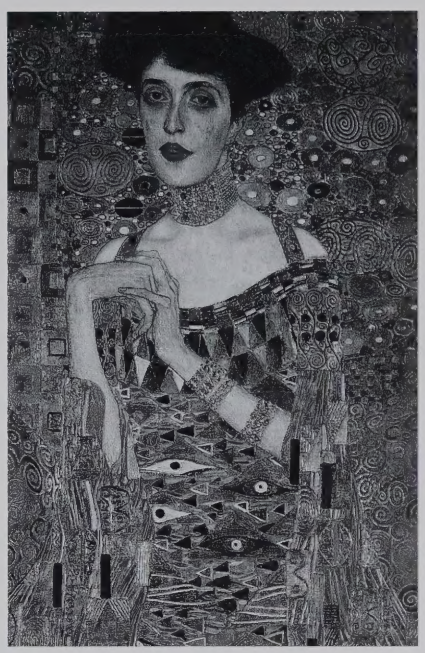

FIGURE 2. Gustav Klimt. *Adele Bloch-Bauer I* (shown cropped). Oil on canvas, 1907. Copyright Erich Lessing/Art Resource, NY. Oesterreichische Galerie, Vienna, Austria.

Nonetheless, the court denied Austria's request to dismiss the claim based on improper venue.

As noted in the last issue of *IFAR Journal* (Vol. 5, no. 2, p. 4, "Conflicting Decisions on Foreign Sovereign Immunity Affect Holocaust Restitution Cases"), U.S. courts have differed in their interpretations of aspects of the Foreign Sovereign Immunity Act as they apply to World War II cases. Whereas the Ninth Circuit in California allows the exemptions in the Altmann case, a recent decision in the Eastern District of New York (*Theo Garb v. Republic of Poland, E.D.N.Y. June 24, 2002*) held that some exemptions to the Act were not retroactive at all and others were not retroactive prior to 1952.

"If the facts were as alleged, 'the paintings were taken in violation of international law'. . . ."

In March 2001, when the Altmann case first came before the California appeals court, it ordered the parties "to explore resolution through mediation." But mediation broke down almost immediately and the court took the case back under submission. —S.F

EGON SCHIELE PAINTING PULLED FROM VIENNA AUCTION IN WWII RESTITUTION CASE

A small early work by Austrian Expressionist painter Egon Schiele has sparked even more debate about Austria's role in WWII art restitution.

The painting, *Wayside Shrine* (Fig. 1), was scheduled to be sold at auction November 27 at the Dorotheum, Vienna's largest auction house (Fig. 2). But its provenance roused suspicions when published in the auction catalogue. As a result, Austrian police, acting on a court order, seized the painting two weeks before the auction. The painting is being kept at the auction house for safekeeping.

What makes this case special is that the painting was actually seized by Austrian authorities. This appears to mark a shift in Austria's posture regarding recovery of and restitution for art taken from Jewish collectors during the Nazi era. It may well have major ramifications for future auction sales in Austria.

The seizure, invoked under the Austrian criminal code, is likely the first step toward a private ownership lawsuit. The court acted in response to a complaint by the Jewish Community of Austria (IKG) on behalf of the heirs of Dr. Heinrich Rieger, a Viennese Jew who died in a concentration camp. Rieger was a prominent pre-War collector of modern art, including works of Egon Schiele. His collection was confiscated or "aryanized" under the Nazi regime. *Wayside Shrine* was in the Rieger Collection. The heirs maintain that it was one of the works taken from him.

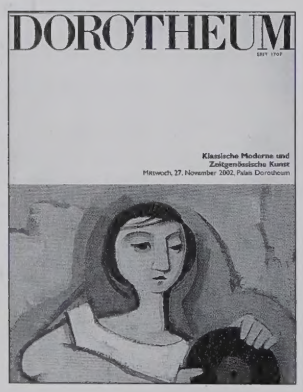

FIGURE 2. Cover, November 27, 2002 Dorotheum Auction Catalogue.

There is no question that the painting did once belong to Rieger. Rieger is cited in the provenance of the Schiele catalogue raisonné—not only in the original version of the catalogue written by Otto Kallir in 1930, but also in his updated version of 1966 as well as the recent catalogue compiled by his granddaughter, Jane Kallir, in 1990/98. The Dorotheum's auction catalogue also listed Rieger in discussing the provenance of the painting. The painting is next known to have been at the Galerie Welz in Salzburg, Austria, a gallery run by Friedrich Welz, a Nazi party member and an art dealer known to have aryanized many collections. (Welz also figures in the high-profile ownership dispute of another Schiele work, *Portrait of Wally*, seized in New York following a loan exhibition at the Museum of Modern Art.)

FIGURE 1. Egon Schiele. *Wayside Shrine*. Oil and pencil on cardboard; 8⅞" x 7½". Withheld from November Dorotheum auction.

At the end of the war, Allied forces arrested Welz and seized his collection for restitution to the rightful owners. But the Americans weren't able to determine ownership of some of the works including one they called *Haus mit Türmchen* (or *House with Turret*).[1] So that painting was sent to the Salzburg state government to sort out the ownership issues. The Salzburg officials, however, eventually returned the work to Welz. *House with Turret* is now presumed to be identical with *Wayside Shrine* (*Bildstock* in German.)

During the 1950s, Welz sold the work to an American musician, William Lincer, a violist at the New York Philhar-

[1] See Gert Kerschbaumer, *Meister des Verwirrens: Die Geschäfte des Kunsthändlers Friedrich Welz*, (Vienna, 2000), p 115.

monic, who played at the Salzburg Music Festival. In 1992, the Galerie St. Etienne in New York, run by Jane Kallir and Hildegard Bachert since Otto Kallir's death, sold the painting on behalf of Lincer to an Austrian, Erich Weninger. According to an IKG press release, Weninger later sold the work to Edith Buchberger, who consigned it to the Dorotheum through her attorney. But Buchberger was not identified in the auction catalogue.

The Dorotheum sales catalogue is not the first time *Wayside Shrine* has been "on view" since it left Rieger's collection. It was loaned for a 1987 exhibition at the Galerie St. Etienne (#58). The exhibition is cited in the Dorotheum catalogue, as well as in the recent catalogue raisonné.

Rieger's son, Robert, escaped Austria with his wife in 1938 and lived in the U.S. Jane Kallir told IFAR that Rieger knew Otto Kallir and frequented his gallery. Otto Kallir's 1966 catalogue raisonné listed Lincer as the owner of *Wayside Shrine*. But no claim was made for the painting while it was in the U.S., either by Rieger, or, after his death, by his daughter, who lives in Philadelphia.

Complicating the ownership issue is the fact that although Jews in Austria were required by Nazi authorities to file an inventory of their collections in 1938, there is no extant 1938 list of Rieger's collection. After the war, some confiscated works were returned to Rieger's heirs, but *Wayside Shrine* was not one of them.

Jane Kallir notes that "it is clear that Welz aryanized a portion of the Rieger collection; *what* portion, and whether this work was among them is not clear . . . The belief that this work was confiscated is based on documents that have recently been uncovered. I have not seen all those documents and, therefore, do not know how conclusive they are."

Stephan Templ, co-author of *Our Vienna: Aryanization in Austria,* a recent book on Nazi activities in Austria during WWII, and one of the people who alerted the IKG to the Schiele at the November auction, said at the time that at the very least, the Dorotheum should have known about the problems surrounding the Rieger collection as discussed in his book and should not have accepted the work for sale.

One of the issues in this case will be the question of good faith purchases, which until now have been shielded in Austria (and many other countries) by its so-called Roman law, or civil law, which conveys legal title even to stolen works of art when acquired in good faith. (U.S. common law, on the other hand, says that even good faith purchasers can't pass legal title on stolen property since they never acquire it to begin with.) Under civil law, once good title is conveyed, it can be passed on to successive purchasers.

If the case goes forward and the Rieger heirs are successful in their suit, it promises to have significant ramifications for other works once part of the large Rieger collection.

FIGURE 3. Egon Schiele. *Standing Woman in Profile*. Watercolor. Withheld from December Dorotheum auction. Photo: Courtesy Galerie St. Etienne.

Wayside Shrine, which measures 8⅞" x 7½" and is dated 1907, is an early work painted when Schiele was only 17 and still studying at the Vienna Academy of Fine Arts. Although his curriculum at the time emphasized drawing, he did paint many small landscapes, such as *Wayside Shrine*. The work, an oil and pencil on cardboard, was estimated by the Dorotheum to sell for $45,000–60,000.

NOT THE ONLY SCHIELE HELD FROM SALE

Wayside Shrine is not the only Schiele work that the IKG asked the Dorotheum to withhold from sale. Another work, *Standing Woman in Profile* (Fig. 3), a small 1908 watercolor scheduled for sale on December 4, was also withheld. Although there was nothing in its history indicating that it was stolen, the provenance showed that the painting once belonged to the Jewish art historian Hans Tietze, who fled Vienna in 1938 and came to the U.S. It is not known at this point whether Tietze took the work with him when he left the country, had it subsequently sent, or whether it was looted and aryanized in Vienna. The simple fact that Tietze was listed in the ownership record raised a red flag to the IKG sufficient to warrant further research and postpone the sale. —**S.F.**

A RASH OF THEFTS—LESSER KNOWN WORKS BY MAJOR ARTISTS

TAKEN: EARLY POLLOCK AND VAN GOGH PAINTINGS, AND A DE KOONING DRAWING
LOCALES: AMSTERDAM AND NEW YORK **VENUES:** A WAREHOUSE; A MUSEUM; A GALLERY

The lure of artworks for assorted criminals is well documented—on the pages of *IFAR Journal* and elsewhere. What never fails to amaze, however, is the stealing of art that is essentially unsaleable—because the artists are so well known and the news coverage often so intense.

Whatever the motive, the fact is that there have been several recent thefts of relatively small, lesser known works by major artists. Here are some examples.

TWO POLLOCKS DISAPPEAR FROM WAREHOUSE

Two early works by Jackson Pollock (Figs. 1 & 2; see also, inside back cover for color image) were stolen in August 2002 from the Cirker Warehouse in New York, where they had been stored for years. Small (each less than 8 inches), untitled, oil on masonite paintings, the works date from c.1934–38, Pollock's early period, a decade before he perfected the "drip" or "poured" style for which he is best known. As listed in the Pollock catalogue raisonné (Vol I, #42 E and 43 F), the paintings form two parts of a three-part panel that once belonged to Pollock's widow, the artist Lee Krasner, and were part of Pollock's estate when he died. They are both painted on the smooth side of the masonite, and neither is signed or dated.

Important works from Pollock's signature "drip" period have sold for well over a million dollars. His small early works have considerably less value (these have been estimated at approximately $150,000 each), but they are still Pollocks and effectively unmarketable. Lloyds of London has offered a reward of $10,000 for information leading to their recovery.

"The two works, on masonite," date from... Pollock's early period, a decade before he perfected the 'drip' or 'poured' style."

BRAZEN BURGLARY AT VAN GOGH MUSEUM

In Amsterdam, thieves broke into the Van Gogh Museum in early December and stole two of his early works: *Congregation Leaving the Church in Nuenen* (Fig. 3) from 1884 and *View of the Sea at Scheveningen* (Fig. 4) from 1882.

FIGURE 1. *Panel F*, 7 5/8" x 6 3/8". Jackson Pollock, Oil on smooth side of masonite. Stolen in New York in August 2002.

FIGURE 2. *Panel E*, 7 1/4" x 6".

The museum, which opened in 1973, contains the largest collection of Van Goghs in the world—approximately 200 paintings and several hundred drawings bequeathed by Van Gogh's nephew. This is not the first burglary at the museum. In 1991, thieves took twenty Van Goghs, including some of his most famous works: one of his iconic *Sunflower* paintings; *The Potato Eaters* (Fig. 5)— the masterpiece of his early Nuenen period; and *Wheatfield with Crows*, generally believed to be the artist's last work, completed just before his death by suicide, in France, in July 1890.

The 1991 theft, however, was solved immediately (see *IFARreports*, May 1991). Police found the paintings—and the getaway car—abandoned at a railway station the day of the theft. Three of the works, however, including *Wheatfield with Crows*, were damaged when the thieves shoved them into the garment bags they used to carry them.

The works stolen in December date from Van Gogh's so-called Nuenen period, before he moved permanently to France in 1886, where he lightened his palette under the influence of Impressionism, and then developed his characteristic Post-Impressionist style. The two stolen paintings have the darker pre-French palette. They are both small oils on canvas. The seascape shows the Dutch North Sea resort of Scheveningen on a stormy day. The later work, from Autumn 1884–1885 shows the congregation leaving

the church in the town of Nuenen where Van Gogh's father was the pastor.

With a ladder and some rope, the thieves got to the roof of the museum in early morning, when the museum was closed, broke through a window, and made their way to the main floor, where they found the paintings. A burglar alarm was triggered, but they were able to get out of the museum. Police surrounded the building hoping to trap them inside, but they were gone. Authorities were dismayed. Museum director John Leighton insisted that "the technical alarm system, the personnel and the police reacted quickly." He added: "We are still in shock. This is the worst thing that can happen to a museum."

"This is not the first time the museum was burglarized. In 1991, thieves made off with twenty Van Goghs."

The motives behind the theft are unclear. No ransom note has been sent, and–once again–art experts are pondering: where is the market for stolen works of such a famous artist? Van Goghs have gone for many millions of dollars, including his 1890 *Portrait of Dr. Gachet,* still the most expensive work ever sold at auction ($82.5 million in 1990, at the height of the art market), but small early Van Goghs do not command astronomical prices. From the public's standpoint, however, monetary value is not the issue when works by major artists are stolen from museums.

DE KOONING DRAWING SWIPED IN BROAD DAYLIGHT

NYPD ASKS IFAR TO PRINT DESCRIPTION OF SUSPECT

In New York, on the same day that thieves stole the Van Goghs in Amsterdam, a thief didn't have to break into anything. He walked into a Madison Avenue gallery in the middle of the afternoon wearing a baseball cap and posing as a customer—even asking for the price list—and stole a small, 1975 Willem de Kooning drawing (Fig. 6), one of two de Kooning drawings displayed on a wall. He then hid the drawing in a stairwell and later retrieved it. Fortunately, he was caught on a surveillance camera and police recognized him.

FIGURE 6. Willem de Kooning. *Untitled Drawing*, c. 1975. Charcoal on paper. 8 7/16" x 11". Stolen from a New York gallery, December 7, 2002.

One week later, the police caught up with him. The de Kooning, however, has not been found. Police, therefore, want more information on the alleged perpetrator and have asked IFAR to publish this description:

Male White; 40 years old; 6.0 feet, 140 pounds, dirty blonde hair.

If this description and the modus operandi sound familiar to you, please contact the Detective Squad at New York's 19th precinct: (212) 452–0635 and ask to speak with either Detective Ryan or Detective Van Dyck. —S.F.

Stolen from the Van Gogh Museum, Amsterdam, December 7, 2002.

FIGURE 3. Vincent Van Gogh. *Congregation Leaving the Reformed Church at Nuenen*, 1884. 42.3 x 32.1 cm.

FIGURE 4. Vincent Van Gogh. *View of the Sea at Scheveningen*, 1882. Oil on canvas. 34.5 x 51.0 cm.

FIGURE 5. Vincent Van Gogh. *The Potato Eaters*, 1885. Stolen in April 1991 from the Van Gogh Museum, Amsterdam and recovered the same day.

FOUR THEFTS IN 20 YEARS: THE SAGA OF THE BEIT COLLECTION

DECEMBER 20TH: POLICE IN IRELAND RECOVER 5 WORKS STOLEN ON SEPTEMBER 29TH

SEPTEMBER 26TH: POLICE RECOVER 2 WORKS STOLEN IN JUNE 2001

AUGUST 7TH: POLICE RECOVER RUBENS PORTRAIT STOLEN IN MAY 1986

AND SO ON . . .

What's been happening to the Beit Collection in Russborough House in County Wicklow, Ireland (Fig. 1) over the last few decades isn't just a story—it's a saga. Fiction-like, but all too true, it involves baffling art thefts, complicated political motives, determined and clever criminals, often frustrated police, and puzzled philanthropists. And it's not finished.

FIGURE 1. Russborough House, County Wicklow, Ireland.

Starting in 1974, the Beit Collection has suffered four major thefts, the last occurring just this past September, 2002. All but two of the paintings have been recovered, but the cumulative effect of thefts and break-ins of varied audacity and violence has left the Collection's staff shaken.

At the time of the September thefts (when five paintings were stolen), Russborough's Administrator was quoted as saying: "It's unbelievable. . . . and it's particularly hard to fathom, given we've just recovered three paintings [from earlier thefts]. We really did think it was finally the end of the story."

But it hadn't been. As if to prove they could simply "do it," thieves had rammed an SUV into a window on September 29, smashing it and a steel shutter, and had stolen five paintings. Two of the five had been stolen in a 1986 theft but were later recovered. The thieves left the SUV on the scene and used a second car for their getaway.

On December 20, Irish Police, acting on a tip, raided a house on an estate in Dublin and recovered the five paintings. The paintings, including a Ruisdael landscape and two works by Rubens (Fig. 2) , were undamaged, but had been removed from their frames. The works were found hidden in an attic.

A middle-aged Dublin couple, Thomas and Noeleen Hughes, were charged with handling the works and knowing or being reckless to knowing that they were stolen. They appeared in court on December 23 and were released on bail. A hearing before the higher Circuit Court is scheduled for February 17.

Ironically, the September theft took place only three days after the recovery of two works—a Gainsborough

FIGURE 2. Peter Paul Rubens. *Venus Supplicating Jupiter*. One of 5 works stolen September 29, 2002 and recovered in December.

FIGURE 3. Thomas Gainsborough. *Portrait of Madame Bacelli Dancing*. One of 2 paintings stolen June 26, 2001; recovered September 2002. Previously stolen in 1986.

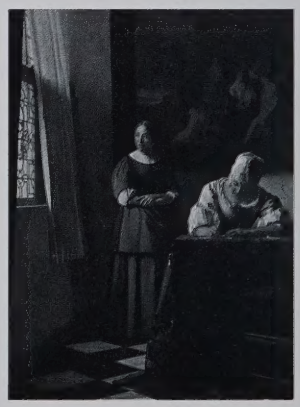

FIGURE 4. Johannes Vermeer. *Lady Writing a Letter with her Maid*. Stolen in 1974 and again in 1986. Recovered.

THE BEIT SAGA—IN BRIEF

APRIL 27, 1974

- An IRA gang led by British heiress Rose Dugdale steals 19 paintings—including a Vermeer and 3 Rubens
- Motive: political ransom—paintings for IRA prisoners
- All works recovered
- Thieves arrested and sentenced

MAY 21, 1986

- A gang of 13 led by Dublin crime boss Martin Cahill steals 18 paintings, including the same Vermeer stolen in 1974.
- Seven works found almost immediately; abandoned on the road.
- Others turned up in locations as far away as Turkey, and one as recently as August 2002.
- Two works still missing; both landscapes by Guardi: *Landscape with Ruins & Townscape*

JUNE 26, 2001

- Thieves ram the front door in daylight
- Steal 2 paintings from the music room—
  Gainsborough's *Madame Baccelli*
  Bellotto's *View of Florence*
- Both works recovered in September 26, 2002 in a house in Dublin

SEPTEMBER 29, 2002

- Thieves ram an SUV into a window
- Steal 5 paintings, including 2 stolen in 1986
- Use another vehicle in getaway
- All 5 works recovered in a December 20th police raid on a house in Dublin
- Man and wife arrested; released on bail; Circuit Court hearing scheduled for February 17, 2003.
- Police investigation ongoing.

portrait (Fig. 3) and a Bellotto *View of Florence*—that were stolen from the same collection in June (the Gainsborough had previously been stolen in 1986), and only six weeks after the recovery of a Rubens' portrait that had been stolen from the Beit Collection 16 years earlier, in 1986!

RUSSBOROUGH HOUSE

Russborough House is a Palladian-style mansion built in1741. It was purchased in 1952, along with 500 plus acres, by Sir Alfred Beit, a South African diamond magnate and former Member of Parliament, to house part of his family's art collection—some 150 works of mainly Flemish, Dutch, and Spanish artists. Many of the works are acknowledged masterpieces. Another part of the Beit Collection is housed in the National Gallery in Dublin. Those works have not been targeted. After the September thefts, Russborough House was closed to the public pending security investigations, and additional works were moved to the National Gallery. Normally, about 26,000 people visit the mansion each year.

In the long view, the thefts are puzzling. It is not as though Russborough House had no security. And after each burglary, security has been improved. Burglar alarms, installed after the first theft, have worked, and police always arrive on the scene promptly. Still, the security invariably seems too late or ineffectual. In 1986, the thieves actually hid in the mansion when the police arrived and then finished the job after the police left. In general, stately homes throughout Europe are more vulnerable to theft than are modern museums.

The first theft at Russborough—April 1974—was the most notorious. An IRA gang, led by English heiress Rose Dugdale, stole 19 paintings, including Vermeer's *Lady Writing a Letter with Her Maid* (Fig. 4) and three works by Rubens. Sir Alfred and Lady Beit were home at the time. They were bound and gagged and watched helplessly while the paintings were cut from their frames, some with a screwdriver. The background was political; the motive was ransom. The IRA tried to barter five of the best paintings for four of their men who were in prison in England. They wanted them transferred to a Belfast prison. They also demanded ransom money. It didn't work. The police recovered all the paintings eleven days later in a raid on an Irish cottage. Rose Dugdale was sent to prison.

Twelve years later, in May 1986, 13 men led by Dublin gangster Martin Cahill stole 18 paintings from Russborough. The stolen items included Vermeer's *Lady Writing*. . . (the very same painting recovered from the 1974 theft!), a Goya, and Rubens' *Portrait of Puteanus*, an oil on panel that was just recovered this past August 2002. Two works from the 1986 theft, both landscapes by Guardi, are STILL missing. The other works were found in various locations, from Britain to Turkey.

The next theft occurred in June 2001 when two paint-

→

ings were stolen in broad daylight. Thieves broke into the front door and took the Gainsborough and the Bellotto. Both works were recovered last September.

And then on September 29, 2002, only three days after that recovery, another five works were stolen. They are the five works that were just recovered in December (see *Stolen Art Alert* this issue for illustrations).

- *Portrait of a Dominican Monk* by Peter Paul Rubens
- *Venus Supplicating Jupiter* by Peter Paul Rubens
- *The Corn Field* by Jacob van Ruisdael
- *Adoration of the Shepherd* by Adrien van Ostade
- *The Calm Sea* by Willem van de Velde

The Dominican Monk and the *Adoration of the Shepherd* were previously stolen in 1986. Mrs. Beit, who still lives in a wing of the house, was not at home at the time of the theft. Her husband died in 1994.

Given the publicity surrounding the crimes and the stature of the Beit Collection, the motive for the thefts is especially baffling. The stolen works are unmarketable on the legitimate market.

IFAR has written about the Russborough thefts on several occasions over the years, and the Vermeer was featured on the cover of *IFARreports*, July/August 1986. We hope that we will need to write only one more article, when the two as yet unrecovered works stolen in 1986 are finally found—Francesco Guardi's pair of Fantasia Landscapes (Capriccio)

- *Landscape with Ruins* (oil on canvas; 19.1 x 15.5 cm)
- *Townscape* (oil on canvas; 19.1 x 15.5 cm) —**S.F**

U.S. CULTURAL PROPERTY IMPORT AGREEMENT WITH CANADA ENDS

With little fanfare, the U.S. agreement with Canada to restrict importation into the U.S. of "certain categories of archaeological and ethnological material" has ended. The five-year bi-lateral agreement began in April 1997 under terms of the Cultural Property Implementation Act (CPIA) of 1983. The CPIA was the implementing legislation governing U.S. participation in the 1970 UNESCO Convention on cultural property. Under terms of the Act, foreign countries that are also signatories to the Convention may apply to the U.S. for help in protecting their cultural property that is in jeopardy of pillage by limiting importation into the U.S.. The requests are reviewed by the Cultural Property Advisory Committee, an advisory body within the U.S. State Department. If the request is granted, a five-year renewable agreement is signed. In August 2001, a notice to extend the agreement with Canada was given. But, in fact, the agreement expired on April 22, 2002.

HASSAM PAINTING RECOVERED AFTER 17 YEARS

SECOND HASSAM STILL MISSING
IFAR'S DATABASE AND ALR SEARCH ARE KEY

In case you were wondering, we can confirm once again that stolen art registries work!

In this case, a painting stolen seventeen years ago—in 1985—has been recovered in large part because it was reported to IFAR at that time and was still listed when a dealer made a routine search with the Art Loss Register (ALR) in April 2002. (The ALR, created in 1991, now administers IFAR's stolen art database.)

Actually, two Childe Hassam paintings were stolen in 1985 from the Maine home of Rosamond Thaxter, a granddaughter of Celia Thaxter, who was a friend of the artist. Only one has been recovered—a watercolor—*White Island Lighthouse* (Fig. 1). Hassam, a major figure in the American Impressionist movement, inscribed the watercolor to Thaxter and dated it July 1886. It depicts the lighthouse off the Isle of Shoals in Portsmouth Harbor, New Hampshire, where Celia Thaxter lived as a child. Her father was the lighthouse keeper.

The other stolen painting, an oil on panel, *Still Life with Vase of Roses* (Fig. 2), is still missing.

At the time of the theft, the two works were reported to IFAR and were illustrated in *IFARreports*, August/September 1985. Years later, that turned out to be key. When, in the spring of 2002, a dealer in Massachusetts made the

request to the Art Loss Register, ALR "matched" the painting to the one in the database and reported the match to the FBI, as well as to Mrs. Thaxter's heir and the insurance company that had compensated the Thaxters after the theft.

The FBI turned the painting over to the insurance company, which had gained title to the work when it paid the claim. Encompass Insurance then returned the work to the Thaxter heir, Jonathan Hubbard, for an undisclosed settlement.

Very pleased, Mr. Hubbard pointed out that the painting has "great sentimental and historic value." It belonged to his great-grandmother and was inscribed to her. "My family and I are also very hopeful," he said, "that the FBI will be able to locate the other stolen painting."

With the painting back in the family's hands, David Shillingford of the ALR noted that "the system works." To which IFAR can only add: Amen! —S.F

FIGURE 1. RECOVERED: Childe Hassam, *White Island Lighthouse*, 1886. Watercolor. 35.3 x 25.7 cm. Inscribed lower right "Mrs. C.T./O.B./ Miss R.L./Mr. C.B."

FIGURE 2. STILL MISSING: Childe Hassam, *Still Life with Vase of Roses*, 1885. Oil on panel. 41.1 x 20.3 cm.

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COPYRIGHT OR COPYWRONG?

THE SUPREME COURT, COPYRIGHT TERM EXTENSION, AND THE ARTS

WEDNESDAY, NOVEMBER 6, 2002

Left to right: Franklin Feldman, Stephen E. Weil, Robert Baron, Alice Haemmerli, and I. Fred Koenigsberg

SPEAKERS (IN SEQUENCE)

FRANKLIN FELDMAN, Chair, IFAR Law Advisory Council; Co-Author, *Art Law*; Retired Partner, Stroock & Stroock & Lavan

STEPHEN E. WEIL, Emeritus Senior Scholar, Center for Museum Studies, Smithsonian Institution; Co-Author, *Art Law*

ALICE HAEMMERLI, Dean, Graduate Legal Studies & Intellectual Programs, Columbia Law School

ROBERT BARON, Chair, Committee on Intellectual Property, College Art Association

I. FRED KOENIGSBERG, White & Case, LLP; General Counsel, ASCAP

THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ARTICLE 1
SECTION 8. *The Congress shall have the power*

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

BREAKING NEWS!
AS IFAR WENT TO PRESS, THE SUPREME COURT RULED 7–2 UPHOLDING THE CONSTITUTIONALITY OF THE CTEA.

INTRODUCTION

The case of *Eldred v. Ashcroft*, challenging the Constitutionality of the 1998 Sonny Bono Copyright Term Extension Act (CTEA), was argued before the United States Supreme Court on October 9, 2002. The Act extended copyright protection for an additional 20 years (to life of the artist plus 70 years; or for a corporate entity, 95 years from creation.) The Act was retroactive. Arguing for the petitioner, Eric Eldred, against the CTEA: Professor Lawrence Lessig of Stanford University Law School. Arguing for the Government in support of the CTEA: Solicitor General, Theodore Olson. The Court decision will be handed down in 2003.

Eldred v. Ashcroft has been called the most important copyright case in the last twenty years. It has split the arts community. Thirty-eight Friends-of-the-Court briefs (*amici curiae*) were filed. Among those who filed against the CTEA were: the College Art Association, the National Humanities Alliance, the National Initiative for a Networked Cultural Heritage, and the Eagle Forum; among those in favor of CTEA: ASCAP, the Motion Picture Association of America, and the Directors Guild of America.

IFAR devoted an *IFAR Evening* to a discussion of the history, significance, and implications of the CTEA, particularly for the arts community. Below are the edited transcripts or written remarks of the five speakers followed by audience questions.

ELDRED V. ASHCROFT: THE ISSUES

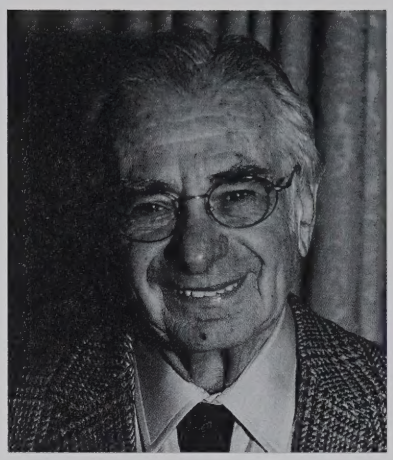
FRANKLIN FELDMAN*

The issue that everybody has come to hear today is a very sexy issue. The New York Times on October 10th—the day after the Supreme Court arguments in *Eldred v. Ashcroft*—reported that the crowd to hear the arguments went around the block. When I read that, I assumed that somehow the Justices were about to see a pornographic movie. It was not such, but it obviously indicated a vast interest in this subject. One reason is that there is a great deal of money involved.

The narrow issue before the Court, that we are going to discuss, is whether or not the 1998 Statute known as the Sonny Bono Copyright Term Extension Act violated or conflicts with two provisions of the United States Constitution. One is the Copyright Clause: Article 1, Section 8. And the other is the provision in the Constitution providing for free speech. But more precisely, as argued before the Court and in the briefs, it wasn't really the question of whether or not the entire statute is unconstitutional but whether or not the twenty year Extension provided by the statute is unconstitutional, at least in so far as it affects existing copyrights, that is to say copyrights which were in existence at the time of the statute. There was some concession in the briefs that perhaps with respect to new creations—new movies, new books, new paintings—the problem doesn't exist. That distinction has not really surfaced in the newspapers as precisely as it did before the Supreme Court.

There were many briefs submitted before the Supreme Court, by constitutional law professors, copyright law professors, intellectual property law professors, you name it. The plaintiffs are a whole variety of institutions. Mr. Eric Eldred is a plaintiff individually, but his firm is also a plaintiff. What Eldred does through his firm is post on the Internet those publications—very important books—which he thinks should be read by the public. He looks for when the copyright expires. As soon as it expires, *bingo!* he wants to put it on the Internet. Dover Publications sells inexpensive versions of very important works, in the art field as well as literary works. They are always looking. They publish works that are in the public domain, meaning copyright no longer exists.

Copyright in the United States is not brand new. There is a copyright provision in the Constitution, oddly in the Constitution, and you might raise the question: why is it in the Constitution? It is there for the same reasons the bankruptcy provision is in the Constitution. The Founding Fathers felt that there were some provisions that had to be uniform throughout the States. You couldn't have one copyright law in New York, another one in California—although there was no California. It had to be uniform, so, therefore, there is only one copyright law. Similarly for bankruptcy, you could not have a debtor decide to take advantage of New York law and not Connecticut law. So those two provisions, which you might say don't deal with the most important issues of our time, are in the Constitution.



FRANKLIN FELDMAN
IFAR Evening, November 6, 2002

"The New York Times on October 10th—the day after the Supreme Court arguments in Eldred v. Ashcroft—reported that the crowd to hear the arguments went around the block. When I read that, I assumed that somehow the Justices were about to see a pornographic movie."

The *Eldred v. Ashcroft* briefs cover the whole range, as I said, but there is one surprising brief, that of Senator Hatch from Utah. It's a wonderfully executed brief and the one, in my judgment, although I haven't read all of them, that reveals the most about the issues. It explains why, in his judgment, this statute and the lower courts' decisions should be affirmed.

Now, what happened in the lower courts? First of all, this was a case brought by the plaintiffs to enjoin the

*Franklin Feldman is a retired partner at Stroock & Stroock & Lavan. He is also co-author of Feldman and Weil, *Art Law* (1986) and Chair of IFAR's Law Advisory Council.

enforcement of the statute–the Copyright Term Extension Act—because they wanted to publish works which they say should be in the public domain. They also argued that, otherwise, if they started publishing, they would be prosecuted under certain criminal statutes. The Government was the party that had to defend the statute. The case first started out under a different title. The defendant's name was originally [Janet] Reno. In other words, the defendant is the U.S. Attorney General. The defendant was later changed to Ashcroft. What were the arguments both ways? The Constitution provides, and this is very important, that Congress has the authority to promote the progress of science and the useful arts by granting—they use the word securing—to writers and inventors the exclusive right to their writings and discoveries. "For limited times" is the key phrase. That became the *gravamen* of the argument on both sides.

Although there will be more discussion by Alice Haemmerli as to what the issues were, the argument of the plaintiffs, the persons who were attacking the statute, were basically as follows: "Limited means limited," you cannot continue to expand the definition or the term of copyright by twenty years, and then another twenty years, whatever. It would turn out to be indefinite. In fact, the first copyright statute in 1790 was for fourteen years, with a renewal period of another fourteen years. Total of twenty–eight years if you renewed, and you could renew *only* if the author was living.

I am not going to get into the question of who is an "author" because in 1954 that issue was raised by Justice William Douglas in the United States Supreme Court, since the Constitution only talks about "authors and writings." Why is a painting a "writing," and why is an artist an "author"? That was never answered by the Supreme Court. It was answered probably most effectively by a law review article in *NYU Law Review*, which cited hundreds of cases where photographers and painters were granted copyright, and that argument sort of died in the wind. Perhaps in the future someone may raise that argument again, to say that the Constitution was never intended to provide such protection to people who simply paint or create prints or what have you. We are not discussing that tonight, but I raise it as a fundamental question.

"'For limited times' is the key phrase. That became the gravamen of the argument on both sides."

The statute enacted in 1790 was patterned after an English statute known as the Statute of Anne, that was adopted in England in the early part of the 18th century, about 1740. The U.S. statute of 1790 provided for a period of fourteen years, plus fourteen years renewal, but it was intended for writers. It clearly was not intended for painters. Congress then enacted a further statute. Altogether, there have been six statutes. 1790 was the first. Then 1831, when the term was changed to twenty-eight years plus fourteen. And then the big statute under which most of us here operated, the statute of 1909. That statute provided for a twenty-eight-year initial term, and a renewal period, which you had to renew in the last year, of an additional twenty-eight years. Total of fifty-six years. I am not getting into ramifications on how the author could have terminated after the first period, but that was the period: twenty-eight plus twenty-eight. Then, in 1976, Congress decided that it had to follow what was done in Europe, and in Europe, copyright term was life plus fifty. Therefore, the 1976 U.S. statute, which modified copyright very substantially, provided for a new term: life plus fifty years. And then finally came the 1998 Sonny Bono Copyright Term Extension Act, when, for a variety of reasons—but one of which was that Europe had extended its copyright by twenty years to seventy years—we added another twenty years. So we should conform with Europe and should also give creators additional protection. That was the basic issue.

In the Supreme Court, what were the arguments of the plaintiffs against the statute? Number one: limited means limited. You can't continue to add twenty years. Second, there are outer limits of congressional authority. Simply because Congress was authorized by the Constitution to extend copyright for limited terms, Congress does not have complete power. There are some limits, and several legal cases were cited to prove that.

The plaintiffs also raised the issue of free speech. If there is a tension between copyright—which gives someone an exclusive right to reproduce something—and the right of free speech—where I have the right to say what I want, to paint what I want or do what I want—then free speech should prevail. At least in this point,

when you are dealing with limited times, enough is enough basically, was their argument.

That was the plaintiffs' principal argument. The plaintiffs also addressed, in a minor way, but I think it's a basic argument, that it's irrelevant that Europe extended copyright for another 20 years. Europe does not have the United States Constitution, which uses the phrase "limited times." Europe could have gone forever. I personally checked with England in the last ten days to see if England is governed by a limited term provision. And the answer is "no." They could go on forever.

The answer on the other side by the Government was: look, limited *means* limited. Twenty years *is* limited. The Sonny Bono statute didn't say a hundred years; it didn't say a thousand years; it didn't say infinity. It said twenty years. Second, Congress has discretion. Three, it's reasonable. Four, about this First Amendment argument, copyright only protects expression, it doesn't protect ideas. So if you have an idea you want to express, go ahead, express it. You could write a book with the same subject matter as Shakespeare, *Romeo and Juliet*, a love story, *Abbie's Irish Rose*, write it your own way. Nobody has monopoly on the idea of that kind of a love story.

This case was brought in the federal court in Washington. The lower court—the District Court for the District of Columbia—basically upheld the statute, for the obvious reasons. The plaintiffs then appealed to the circuit court of appeals, a three-judge court. There, it was not an unanimous decision. Two of the three judges said: "yes," we affirm the statute principally for the arguments raised by the Government. The other judge, Judge Sentelle, said "no," absolutely not, copyright should not be extended, for the arguments that I already mentioned. Then, the plaintiffs filed an application for what is known as *certiorari*, for permission to have the case heard by the United States Supreme Court. And probably to the surprise of many, including many who signed the briefs and the *amici curiae*, the Supreme Court granted *certiorari*, and on October 9th granted oral argument.

"What were the arguments of the plaintiffs against the statute? Number one: limited means limited. You can't continue to add twenty years. Second, there are outer limits of congressional authority. . . . The plaintiffs also raised the issue of free speech . . ."

The decision will probably not come for months. How it will go is anyone's guess. Years ago I stopped guessing how the Supreme Court would go on any issue, and I certainly am not going to change that habit today.

In concluding, I want to add one other thing, somewhat anecdotal, that puts this case in perspective. For over twenty years, I taught a seminar at Columbia Law School. One of the class requirements was to write a paper of your own choosing. About seven years ago, a student in the class said: "I am really stuck for a paper subject, do you have a suggestion?" And I said: "Yes, I do. Why don't you write a paper on the extension of copyright? I have always been interested in Mickey Mouse, and I know that Mickey Mouse is going to expire in a few years. Walt Disney created it in 1928, when he did his first drawings." He said: "Fine." I added: "But I ask you to do one thing before you finish the paper. Would you please call the lawyers for Walt Disney, tell them what you are doing, and ask them what their views are, because it might be of interest." About six weeks later, he handed in the paper, and I recall my conversation. I said: "By the way, did you call the lawyers for Walt Disney?" He said: "Yes, I did." And I said: "What did they say?" He said: "Well, as soon as I told them what I was doing, they hung up the phone." So that will give you some idea of what's at stake in this Supreme Court case. I now turn the microphone over to Steve Weil, who will dwell on the public domain.

COPYRIGHT & FAIR USE

STEPHEN E. WEIL*

My assignment tonight will be to try to momentarily go beyond *Eldred v. Ashcroft* and put the case into some larger copyright context before my fellow panelists then rein in on it specifically.

What's at stake in *Eldred* is the duration of copyright, and how long a copyright should last is obviously an important question. Just as important though is the question of what kind of a copyright we are talking about. Are we looking down the pipe at a copyright—whether or not the term is extended—whose scope will continue to be tempered by those limitations that have traditionally served as counterweights to the copyright owner's monopoly, counterweights such as the idea or expression distinction, first sale, fair use, and ultimately passage into the public domain? Or might we be looking at a copyright that could confer on copyright owners a far stronger monopoly than the one they have heretofore enjoyed? In approaching that question, what I want to look at is one of those limitations: fair use.

Let me start with three basic premises. And as you'll see I differ somewhat from Frank in my belief as to why we have a copyright clause in the Constitution. But the first premise, very obviously, is that what our Constitution provides us with is a system of self–government. Second, that for a system of self–government to survive and flourish, its citizenry must be able to make informed decisions, decisions requiring that they have access to a broad range of ideas. And third, that copyright, both as originally rooted in the Constitution's copyright clause and through its growth in the past 200 years, has been primarily concerned with the ongoing generation and free-flow of such a range of ideas. As Justice O'Connor said in *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539,558 (1985): "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."

"What's at stake in Eldred is the duration of copyright . . . Just as important though is the question of what kind of copyright we are talking about."

The Copyright Clause, however, is not the only provision in our Constitution to deal with the generation and free flow of ideas. That is also the province of the First Amendment and one of its central concerns: freedom of speech and of the press. How do these two Constitutional provisions work together? From the point of view of a copyright owner, they can well be seen as working in harmony. On the one hand, copyright functions as an incentive for producing new work. On the other, the First Amendment functions to clear away certain potential obstacles to the dissemination of that work.

That harmony can quickly dissolve to discord, though, when we turn to the situation of a **non**–copyright owner seeking to make use of a copyrighted work. Here, the rights of the potential user–rights derived from the First Amendment—may come into open conflict with those granted to the copyright owner by copyright law. In the most extreme cases—and we'll look at one such extreme case in just a moment—the assertion of rights under copyright may actually segue into something very close to censorship.

To resolve such conflicts, copyright law has developed a number of exceptions that will in effect, and only within certain limited circumstances, allow First Amendment rights to trump copyright rights. Fair use is one of those. Originally developed by the federal courts starting in the 1840s, fair use finally achieved statutory recognition as Section 107 of the 1976 Copyright Act. It provides that the unauthorized use of copyrighted works for such purposes as "criticism, comment, news reporting, teaching, scholarship or research" may not constitute infringement depending on a series of circumstantial factors. These include (but are not necessarily limited to) the nature of the use, the nature of the copyrighted work, the amount copied and the effect of such use on the market for the copyrighted work.

Which brings us to the extreme case referred to earlier—a case in which fair use played the critical role. The case is *Houghton Mifflin v. SunTrust Bank,* 268 F 3d 1257 (11th Cir. 2001). (District Court was *SunTrust Bank v. Houghton Mifflin,* 136 F. Supp. 2d 1357 (N. Dist., Georgia, 2001)) which was decided last year and in which the heirs of Margaret Mitchell were unsuccessful in trying to prevent the publication of *The Wind Done Gone,* a novel that utilized some of the same characters, plot situations and major scenes that had first appeared in *Gone With The Wind.*

*Stephen E. Weil, Esq. is Emeritus Senior Scholar, Center for Museum Studies, Smithsonian Institution. He is also co–author of Feldman and Weil, *Art Law* (1986) and a member of IFAR's Law Advisory Council.

Let's start with *Gone With The Wind*. GWTW was published in 1936. Under the copyright law then in effect—it provided for two twenty-eight-year terms—it would have passed into the public domain at the end of 1992. The transition provisions of the 1976 Copyright Act extended that date to 2011. If the Sonny Bono Copyright Term Extension Act is upheld in *Eldred*, it will now remain in copyright through the year 2031.

The Wind Done Gone was written by Alice Randall, a young African-American Harvard graduate who, at one time or another, has been a screenwriter, a country songwriter, and a Washington journalist. In the book, Randall retells many of the episodes from GWTW from a totally different perspective—that of the slaves and servants who worked at Tara. Her intent, she testified, was to critique both slavery and the general ethos of the Civil War South as those were presented in Mitchell's book. In an interview subsequent to publication, Randall spoke of her work as tantamount to revisionist history:

> *Gone With The Wind*—the book, the movie, the costume, the quips—has reached the status of myth in our culture. GWTW is integrated into the fabric of our culture. It is more powerful than history because it is better known than history. Unfortunately, GWTW is an inaccurate portrait of Southern history. It's a South without miscegenation, a South without whippings, a South without families sold apart, a South without free blacks striving for their education...GWTW depicts a South that never, ever existed.

In the spring of 2001, as Houghton Mifflin was preparing to publish Randall's book, SunTrust Bank—the Trustee for Mitchell's heirs—went to court in Atlanta to charge (among other things) copyright infringement and to demand a preliminary injunction. This was granted on April 20. The publisher quickly moved for an expedited appeal. In May, the Court of Appeals for the Eleventh Circuit lifted the injunction on the grounds that it constituted an unconstitutional prior restraint under the First Amendment. In October of last year, the Court issued a more comprehensive written opinion reaching that same result.

On first reading, this "more comprehensive opinion" seems like a typical fair-use analysis in which the Court picks its way through the relevant factors set out in Section 107. Randall's book, it found, was intended as a serious comment—her "literary goal," the Court said was "to explode the romantic, idealized portrait of the...South" as depicted by Mitchell. Moreover, nothing in the record supported the notion that her book might in any way usurp the market either for Mitchell's book or for any derivative version that the Mitchell heirs might be likely to authorize. There had, in fact, been compelling testimony in the District Court that they would never have authorized any sequel that included miscegenation (in Randall's book, the former slave who serves as its protagonist eventually marries the Rhett Butler figure) or imputations of homosexuality (as in Randall's version of Ashley Wilkes). In 1998, the author Pat Conroy had been approached about writing a sequel to the original novel. He declined after his agent, Julian Bach, was advised that under no circumstance could it include any hint of interracial sex or homosexuality.

On closer examination, though, there are two other striking aspects to this opinion: one is how very closely the Court ties the fair use doctrine to the very constitutionality of the 1976 Copyright Act. It even suggests at one point that—because the '76 Act deliberately dropped "publication" as a prerequisite for federal copyright protection—fair use had become the only "statutory guarantee that new ideas, or new expressions of old ideas, would be accessible to the public." In a similar vein is the observation by Judge Stanley Marcus, in his concurring opinion, that the monopoly granted to copyright holders is not designed to stifle criticism nor should it be interpreted as giving them any power of "indirect censorship."

STEPHEN E. WEIL
IFAR Evening, November 6, 2002

The other striking feature is the Court's clear discomfort with the use of injunctive relief in a copyright case of this type. As several commentators have recently pointed out, there appears to be ongoing pressure on the federal district courts to find some more imaginative set of remedies. As Justice Ginsburg observed in *New York Times Company, Inc. v. Tasini*, 333 U.S. 483 (2001), quoting *Campbell v. Acuff-Rose Music, Inc*, 510 U.S. 569 (2001), the goals of copyright law are not always best served by granting injunctive relief and that there are many other models on which the courts and/or Congress might draw in remunerating authors for the unau-

"FAIR USE HAS NEVER BEEN VERY POPULAR AMONG THE MAJOR CORPORATE PLAYERS WHO INCREASINGLY DOMINATE THE COPYRIGHT FIELD AND WHO . . . HAVE SHOWN THAT THEY CAN WIELD CONSIDERABLE LEGISLATIVE CLOUT."

thorized distribution of their copyrighted works.

To return to the main point: the extension of the copyright term by another twenty years might not seem like such a daunting prospect if we could be assured that the copyright to be extended was that same copyright that we've known in the past—a copyright reined in from excess by such built-in safeguards as the fair use doctrine. Notwithstanding its brilliant performance in *The Wind Done Gone* case, however, the troubling fact is that fair use is not without its troubles these days.

"THE EXTENSION. . . MIGHT NOT SEEM LIKE SUCH A DAUNTING PROSPECT IF WE COULD BE ASSURED THAT THE COPYRIGHT TO BE EXTENDED WAS . . . REINED IN FROM EXCESS BY SUCH BUILT-IN SAFEGUARDS AS THE FAIR USE DOCTRINE."

Fair use, to begin with, has never been very popular among the major corporate players who increasingly dominate the copyright field and who—as in the case of the 1998 Copyright Term Extension—have shown that they can wield considerable legislative clout. I can recall one music industry attorney angrily denouncing fair use as nothing but a sort of "tax" imposed on the strong to benefit the weak. On another front, those who approach copyright primarily in terms of economic analysis tend to write fair use off as little more than a mechanism for dealing with instances of market failure. The greatest problem for fair use, however, is probably its poor fit with the emerging digital environment. As early as 1995, in the so-called "White Paper" on Intellectual Property and the National Information Infrastructure, it was speculated that fair use might even be "an anachronism with no role to play" in the coming age of electronic commerce.

Fair use is, at bottom, a "don't ask" practice. Typically, the use comes first and the discussion of whether or not the use was fair then follows if and when the original owner objects. In a universe of encryption-guarded information, this sequence may not work. Fair use is far too fact-specific to make an easy fit into a seamlessly functioning and self-regulating system in which all the aspects of a copyright negotiation—the scope and terms of a proposed use, the fee to be paid and perhaps even the payment of that fee—might be wholly integrated into one smooth electronic process.

Looming large on the copyright landscape today is the Digital Millennium Copyright Act—the DMCA—passed by Congress in 1998, the same year as the Copyright Term Extension. This is the legislation intended to prevent—through both civil and criminal penalties—the circumvention of the technological measures by which encryption is accomplished as well as the manufacture and distribution of equipment that might be used for that purpose. There is no exception for fair use in the DMCA. If Alice Randall had been making a documentary instead of writing a book, and if she'd hacked her way into a DVD of *Gone With The Wind* to copy out a scene for inclusion, the outcome under the DMCA would have been wholly against her no matter how fair her ultimate use.

Two recent efforts to graft fair use onto the DMCA have both failed. One was in a rulemaking proceeding mandated by the statute itself to determine whether the users of copyrighted works in any "particular class of works" would be adversely affected by the legislation. Proponents of fair use argued that they fell under this definition. The rulemaking found otherwise. In a determination announced in October 2000, "particular class of works" was defined as referring to the type of work that something was, i.e., a film or a book or a painting, and not to the kind of use that somebody made of it. This past October 15, the Copyright Office announced that a second such proceeding—also mandated by the DMCA—was to be conducted with comments due by this coming December 18. While at least some proponents of fair use are planning to re-argue their case, the outcome will most likely be the same.

The other effort, which fared no better, was in *Universal Studios, Inc. v. Corley,* 273 F.3d 429 (2nd Cir. 2001) —a case involving the so-called DeCSS program for de-encrypting a DVD—that the Second Circuit Court of Appeals decided this past November. There, the defendant-appellant argued that the DMCA was unconstitutional in failing to provide a fair use exception. The Court made relatively short work of this argument. The DMCA, it said, dealt with access—not with the right to make copies. While an art student might have the right to make copies of a painting, neither the Copyright Law nor the Constitution guaranteed her the right to photograph that painting in a museum where it might just happen to be on view.

To conclude then, as this evening's discussion proceeds, I hope that you'll not just think about how long copyright ought properly run but, also, about what kind of a copyright we may be dealing with in this new electronic and corporate-dominated environment. Can you ever change just one thing? Or is the web of copyright so intricate that something as seemingly simple as changing copyright's duration suggests that maybe some other changes might now be appropriate as well?

FACT & FICTION IN THE ELDRED V. ASHCROFT DEBATE

ALICE HAEMMERLI*

Good evening and thank you. Well, I must say I feel uniquely privileged in that I get to find fault with both sides in this debate!

Let me start with some full disclosure. I was never a Sonny Bono fan, and I dislike the Copyright Term Extension Act (CTEA). I grew up loving Disney and am one of the few adults I know who has voluntarily made multiple visits to Disney World. But I don't like the idea of cultural Disneyfication, whether that connotes excessive blandness and homogeneity, or carries more sinister implications of corporate control of art. It would be tragic to think that works for hire tailored to corporate tastes and artistic criteria could ever eclipse the art of independent authors; above all, copyright law should protect human creativity unfettered by corporate rules. Having said all that, I would hasten to add that these are all policy preferences, judgments about what serves or dis-serves our social system and cultural health. They are not legal interpretations of the Copyright Act or of the Copyright Clause of the U.S. Constitution. Yet it seems to me that there are a number of areas in which both sides of this debate tend to conflate political preferences with legal interpretation. So, to begin with, let me make a few preliminary points of *fact*:

*Alice Haemmerli, Esq. is Dean, Graduate Legal Studies & International Programs, Columbia Law School. She was Of Counsel to attorney for two plaintiffs in *Tasini v. The New York Times*.

• First, a law can be distasteful, even dysfunctional, without thereby being unconstitutional.

• Second, if laws that reflect the successful outcome of special interest lobbying were ipso facto unconstitutional, we could junk thousands of statutes—federal, state, and local—maybe even the internal revenue code!!

• Third, one of the arguments made by CTEA proponents is that the public domain isn't what it's cracked up to be anyway—they cite Mark Twain's complaint that the expiration of an author's copyright only made publishers rich, because they could continue to exploit the author's work without paying royalties—the public still paid. But the fact is that it's been awhile since rumors of Twain's death were greatly exaggerated, and the public's ability to exploit public domain works has been transfigured. Today, with public access to works achievable directly on the Internet and without the intermediation of publishers, the public domain is indeed public. As a result, expiration of copyright and the injection of works into the public domain does directly benefit the public, and not just publishers. So the *fact* is, it makes a difference to the public whether and when works flow into the public domain.

"Today, with public access to works achievable directly on the Internet and without the intermediation of publishers, the public domain is indeed public. . . . So the fact is, it makes a difference to the public whether and when works flow into the public domain."

ALICE HAEMMERLI
IFAR Evening, November 6, 2002

• The next fact, though, is that there is a big difference between *preventing* the entry of works into the public domain and *removing* works from the public domain. Petitioners and their *amici* cite patent cases holding that Congress cannot use its power to remove existing knowledge from the public domain. That's fine—but the whole point here is that copyrighted works are by definition not *in* the public domain.

• As a consequence, I think it is specious to argue, as do petitioners and *amici*, that the retroactive or retrospective term extension of works already under copyright is unconstitutional because it "removes" works from the public domain. Implicitly recognizing this fact, petitioners try to argue instead that works that have been under copyright for many years *should* be public domain that is, should not benefit from further copyright protection—because they are no longer "original." But the *fact* is that for copyright purposes, once a work is original, it stays that way. It does not lose originality just because it is out

"A LAW CAN BE DISTASTEFUL, EVEN DYSFUNCTIONAL, WITHOUT THEREBY BEING UNCONSTITUTIONAL."

there. Yet petitioners and some amici maintain that once a work is existing or distributed, it becomes less original. For instance, Eagle Forum's brief says—and I quote—

> 'originality' for a reproducible work fades over time, particularly after the author has departed. Congressional fiat cannot bestow the constitutional requirement of originality on old, often–used works. Legally and artistically, their originality is exhausted, and Congress cannot breathe it back into them.

Well, this is probably real news to an artist who has done some great photographs or paintings or poems that have been widely published over the last 10 or 20 years!!! You might think that a work may be publicly available, familiar, even over-exposed, without becoming non-original in the copyright sense—and you'd be right. In other words, in view of the fact that copyright subsists in original works and just keeps on subsisting after public distribution, this argument is legally nonsensical. The Court of Appeals got it absolutely right on this one.

"DO WE REALLY WANT THE SUPREME COURT TO FIGURE OUT WHETHER TERM EXTENSION IS FACTUALLY AND POLITICALLY JUSTIFIED? NO. WE WANT THE COURT TO TELL US WHETHER IT IS CONSTITUTIONAL."

• What about attacking CTEA because film preservation is such a weak premise for legislation? Film preservation was the justification for CTEA used by the Appeals Court, and it is roundly criticized by petitioners. According to CTEA supporters, a film as renowned as "It's a Wonderful Life" was in such ghastly condition that it was an "orphan" of the Public Domain, ravaged and un-cared for." (Martin 274). Only when owners of certain underlying rights began to assert themselves did the money flow, allowing for the proper restoration of

"'Limited' could mean finite—as some point out, federal copyright law was enacted as a counterpoint and contrast to common law copyright, which was perpetual. Alternatively, 'limited' could mean short . . ."

the film. Meanwhile, petitioners also characterize as "orphans" the old films whose copyright owners can't be identified, making it prohibitively risky to restore old films until they have clearly passed into the public domain, by which time they may have rotted away. This is a good example of how the question of a work's fate being benefitted or harmed by being in the public domain is very much a *question of fact*.

So here we are with all of these fact questions and political judgment calls. Even if film preservation is a tenuous rationale for legislating, does that mean the legislation is unconstitutional? Do we really want the Supreme Court to figure out whether term extension is factually and politically justified? No. We want the Court to tell us whether it is constitutional. So let us consider briefly several of the constitutional arguments.

The first two are Copyright Clause arguments: The "progress" argument and the "limited times" argument. The third is the First Amendment argument.

According to petitioners, the "progress" argument says that a congressional enactment under the Copyright Clause must promote the "progress of science." Therefore, the power to legislate is conditioned on fulfilling the purpose of the Copyright Clause, which is to further art and knowledge by encouraging the creation of works. Obviously, a term extension for a work that has already been created will not act as an incentive to the creation of that work. And it is well settled that the public benefit is the ultimate goal of the copyright clause; so it is persuasive to read Article I, Section 8 in the context of that purpose of progress. But there are three problems here. First, the "progress" objective is stated in preambular language, and petitioners conceded below that it does not limit congressional power. Second, "progress" is read by others to refer as much to dissemination as to creation of works; and CTEA arguably supports dissemination. Third, if the extension of existing copyrights is unconstitutional because it offers the benefit of term extension to works that have already been created and disseminated, then what about other copyright legislation that's done the same thing? How do we differentiate CTEA from other legislation that has extended copyright terms? This problem does not easily go away, which is perhaps why Justice Breyer suggested finding another theory . . . .

OK—what about the "limited time" argument? Petitioners argue, in essence, that copyright was meant to be of limited duration, and that repeated extensions that perpetuate copyright protection merely accomplish piecemeal what would be constitutionally prohibited in a single act. That actually sounds pretty plausible. The problem is that it's hard to get past the fact that CTEA does prescribe a finite extension. Another difficulty

with the limited time argument is that we're not entirely sure what the Framers meant. "Limited" could mean finite—as some point out, federal copyright law was enacted as a counterpoint and contrast to common law copyright, which was perpetual. Alternatively, "limited" could mean short, as Professor Lessig and the law professor's *amici* would have us believe. Their point is that the Framers wanted a short term because they were reacting with aversion to the perceived evils of monopolies. The phrase "limited times" could also support serial extensions that are all in themselves of specified duration. Ultimately, the concept of "limited" times may well reduce to a policy determination of what term is most functional for the avowed constitutional purpose of promoting the production and dissemination of works—which brings us back to the question of what contributes to "progress," and all of its attendant difficulties.

A possibly more promising avenue for critics is the First Amendment challenge.

The Appeals Court's statement that "copyrights are categorically immune" to First Amendment challenge was unfortunate. That copyright has been found to be consistent with the First Amendment, or even the "engine of free expression," does not mean that conflict cannot arise between the two. Copyright does, after all, limit speech in that it limits our use of others' expression. Of course, it does not stop us from using others' ideas, nor does it hinder our ability to articulate our *own* expression. For that reason, it is inappropriate to refer, as some of petitioners' *amici* do, to cases involving the restriction of individuals' expression where they are the ones originating that expression. That is very different from restricting the right of individuals to use others' expression. But I think it legitimate to ask whether the needs of the public for access to and use of copyrighted expression will be inordinately burdened by CTEA. Here is where the Court of Appeals and others might have gone astray, in saying that because copyrighted works are subject to fair use, this "obviates further inquiry under the First Amendment." It really doesn't. Fair use will very often prove adequate to the needs of scholars, researchers, and artists. But fair use is necessarily ad hoc, and does not always coincide 100% with First Amendment needs. For instance, if a use is commercial but important to public debate, it might fail a fair use test but succeed under a First Amendment analysis. When copyrighted photos of JFK's assassination were published without permission, the court excused it on fair use grounds, but the real rationale was a First Amendment notion that the public's need for access to the information in the photos trumped the copyright owner's exclusive rights. (In fact, in that case, there was an identity between fact and expression, because the only way to see what really happened was with the copyrighted photographs, the only contemporaneous visual recording of the event.) And the courts, while usually stating that fair use subsumes First Amendment interests, do occasionally differentiate them. So I would have to part company with Floyd Abrams on this point. Of course, he agrees that copyright should be subjected to First Amendment needs, but he asserts that those needs can be accommodated by copyright's internal fair use and idea/expression mechanisms; he therefore rejects the idea of subjecting a copyright law to an external test such as petitioners propose.

Briefly put, petitioners suggest that the Court should subject the CTEA to "intermediate scrutiny": when a law is content neutral but may restrict speech, we ask whether it advances an important governmental interest in a way that does not burden speech more substantially than necessary. It can burden speech somewhat—but it must not do so excessively. Well, here one might think CTEA is vulnerable, because it advances a government interest that has not been very well articulated—or at least not in the lower court decisions—yet places a potentially significant burden on speech in terms of limiting the number of works that enter the public domain for the benefit of the public.

"The CTEA appears designed more to protect corporate copyright owners. Whether or not this is actually the case, the perception that copyright is increasingly used to protect gigantic media companies against the interests of individuals is a fact. And this fact . . . gives copyright a bad name."

Now, in support of CTEA, Abrams asserts that this intermediate scrutiny is an inappropriate First Amendment test. Even if copyright is subject to a First Amendment test, why propose an intermediate scrutiny test when copyright laws have not generally been subjected to it? And how can the relative burdens and benefits of life+50 or life+70 really be measured in terms of which strikes a better balance between keeping works out of the public domain and encouraging new works? Perhaps, if any First Amendment test is proper, it should be the less demanding one of whether Congress has acted rationally in enacting legislation.

Well, it's easy to see why petitioners didn't choose a rationality test. There was not a complete absence of debate over the CTEA. Even if enactment was swift, that does not mean it was irrational. Lobbying might have been lopsided and debate might have been truncated, but there were hearings. Congress had sufficient evidence to make a rational judgment. The law might be the result of a political bargain that advantages the few at the expense of the many, and as such, it may be reprehensible—but it was not as a result enacted arbitrarily.

I do not like the CTEA. I think the term is excessive and I do not believe this act reflects the spirit of the Copyright Clause, because its interference with the public benefit that is the clause's ultimate aim may outweigh the benefits it provides in terms of encouraging the creation and dissemination of new works. And, to come back to where I started, I think it's poor policy to overprotect corporate copyrights. For one thing, I feel strongly, as mentioned earlier, that copyright was designed to protect individual, independent authors and the expressive diversity our society and political system need, and I'm not sure that we get that from corporate products. The CTEA *appears* designed more to protect corporate copyright owners. Whether or not this is actually the case, the perception that copyright is increasingly used to protect gigantic media companies against the interests of individuals is a fact. And this fact—this impression of an adversarial relationship between copyright owners and the public—gives copyright a bad name. This is most unfortunate, because individual authors still need copyright and are not the villains in this piece.

Ultimately, however, this statute seems to me to represent a political choice made by the responsible party, which is Congress. And it is not for the courts to second guess such decisions. They may be politically questionable, but they're not necessarily unconstitutional. As such, if we want to change them, I'm afraid we'll have to get busy in Congress rather than the courts.

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THE CASE AGAINST COPYRIGHT TERM EXTENSION

ROBERT BARON*

Scholarly, academic and artist communities feel as if they are under attack. Time and time again we hear reports that copyright law is obstructing our scholarly and educational missions:

• Permission to reproduce a visual work is refused in order to prevent an author from expressing an opinion.

• An historian working for years with Depression era documents and images, due to Copyright Term Extension, suddenly can't publish because his primary materials won't enter the public domain as originally scheduled. Because these copyrighted materials are either anonymous or their creators can't be found, they are unpublishable; nobody can be found to grant permission to use them and nobody will publish them without permission.

• An art department is ordered by counsel to stop building its slide collection by photographing books and photographs—fearful of infringement suits.

• Another academic department is ordered to obtain permission for every image they use—each time they use it. Courses will have to be planned in detail two to three years before they can be given–potentially causing havoc in faculty hiring, and making it nearly impossible to respond to new ideas in class and burdening administration with incalculable expenses. Under rules like these, art history departments are doomed to extinction.

• Newly hired faculty members are informed they must come with their own slides because the department won't take the chance of producing them.

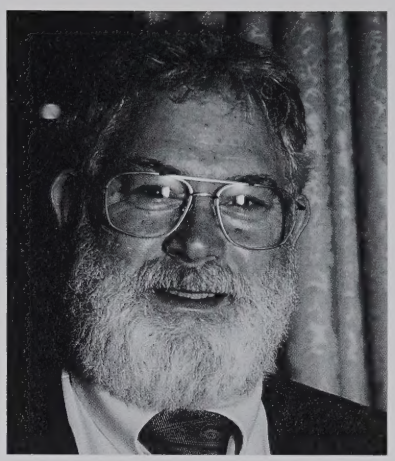
• Publishers, fearful of suit, refuse to claim fair use, forcing authors to rewrite their texts or abandon projects.

• Forced to pay the price of ever more expensive image rights, authors are weak parties in a blame game between publishers and rights-holders.

• Artists must abandon age-old academic practices because the results of copying and adaptation are now potential infringements.

Replicate these stories by the hundreds and it becomes clear to what extent the weight of expanding copyright inhibits the ability of scholars to examine current and past issues. It limits speech. There is a rippling effect too. As it becomes ever more challenging to bear the costs of obtaining publishing rights, young scholars experience increasing difficulty meeting the requirements needed for advancement and tenure.

For some time, now, scholars and teachers have been watching their traditional rights and long-time exemptions fade away in the face of increased pressure to subject the materials used for teaching and research to the demands of copyright owners—in spite of the specific fair use exemptions the statute specifically reserves to creation, education and commentary. Under the current tight regime, fair use and the public domain have become key resources for the non-profit world of teaching and scholarship, and crucial for the creation of new art; but fair use has proven difficult to claim, resulting in increasing levels of self-censorship—anathema to respectable scholarship.



ROBERT BARON
IFAR Evening, November 6, 2002

"Scholars have been watching their traditional rights and long-time exemptions fade away in the face of increased pressure to subject the materials used for teaching and research to the demands of copyright owners—in spite of the specific fair use exemptions..."

To many of us, the Sonny Bono Copyright Term Extension Act came as the last straw. If the withering of the public domain is not halted now, when will it stop? If Eldred does not succeed, what will prevent Mary Bono and her friends in the entertainment industry from extending copyright (as they propose) until it lasts "forever less one day"? The deceptively humanistic

*Robert Baron is Chair, Committee on Intellectual Property, College Art Association. An extended version of this paper, with documentation, is available on his Website: http:www.studiolo.org/IP/IFARtalk.html

argument suggesting that copyright should cover two generations past creation reveals itself as a sham—a transparent metaphor that served only to ratchet fifty up to seventy—a device that gives a human face to a corporate mission—a device that will evaporate as a rationale as soon as it becomes an encumbrance to requesting an additional twenty or fifty years. The European Union is already dissatisfied with life plus seventy. Will our struggle to "harmonize" with copyright terms offered by the European Union lead into a self-destructive cycle of chiseling at the borders of the public domain? During the Eldred hearing, the Supreme Court wondered what kind of chaos would ensue if our successive copyright extensions were to become unraveled by an Eldred success; they did not ask what kind of calamity would follow in the footsteps of a government triumph.

". . . WHAT WILL PREVENT MARY BONO AND HER FRIENDS IN THE ENTERTAINMENT INDUSTRY FROM EXTENDING COPYRIGHT (AS THEY PROPOSE) UNTIL IT LASTS 'FOREVER LESS ONE DAY'?"

Those of us who use the arts as a source for creativity and understanding have placed our faith in the so-called "constitutional copyright bargain." We agree to honor copyright for a limited time, because we know that its incentive to create feeds the public domain. It is the vitality of the public domain upon which much of the success of our discipline relies. As fair use is becoming an ever-diminishing option, it is clear to us that reliance upon the public domain is increasing in importance. But, under copyright extension, as the public domain recedes further and further from our grasp, the raw materials needed for creation and comment are becoming increasingly unavailable and consequently less useful.

Acknowledging how creators of new works are multifariously dependent upon the example of others, I think, as a class, we would all tend to agree with Jessica Litman, who exclaimed some time ago that "a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all." Copyright needs the public domain as a nourishing font from which to draw sustenance. I wonder when the copyright cartels will discover that their push for ever-expanding periods of protection is but a self-defeating exercise since addition multiplies levels of rights administration (and costs) and therefore ultimately impedes access to the past. Following this thought, under the weight of extended copyright's mounting obligations to identify sources, to track and pay for rights, the wisdom and meaning of the hotly debated Constitutional phrase "limited Times" becomes crystal clear.

"This means that any work that had been due to be elevated i the public domain just as the CTEA became active, has had copyright extended by an additional twenty years—thus pulli the rug out from under expectant scholars and artists."

I see that in the roster of speakers tonight, I am the only one who is not an attorney, and so, as you are about to learn, I won't be presenting the merits of *Eldred v. Ashcroft* as College Art sees it—at least not as a technical legal argument. But I would like to give you some of the root thinking behind what I believe our purposes were in supporting Eldred, at least to the extent we did.

But, before I begin, I must mention that I am not here speaking on behalf of the College Art Association. The opinions I present are my own—but, thankfully, not mine alone. Also, I'd like to tell you that the CAA amicus was undertaken by Jeffrey Cunard and his staff from Debevoise and Plimpton. Jeff and his firm offer their services to CAA pro bono.

The Sonny Bono Copyright Term Extension Act affects copyright in two fundamentally different ways. On one hand it extends copyright for all works created from the time the law took effect, onward. On the other hand, it retroactively extends protection for all works then currently under copyright—works that had already been created. This means that any work that had been due to be elevated into the public domain just as the CTEA became active, has had its copyright extended by an additional twenty years—thus pulling the rug out from under expectant scholars and artists.

College Art chose to address only the retroactive portion of the Act. Their primary complaint relied upon the restriction to free speech imposed by taking away a right that had already been scheduled by law and that removal of this right forces self-censorship. Their brief alleges that content-neutral regulations of speech (as is the CTEA) are constitutional only when they further a substantial government interest unrelated to the suppression of free expression. In the case of the CTEA, the only reason for extending copyright was to give twenty years of added revenue to a few copyright holders—there was no substantial government interest. Additionally, there was no judicial analysis

(as required) of the effects consequent to rescinding these rights. The impact on the public was not considered. This is enough, I'm told, to invalidate the Act and to remand it for reconsideration.

Retrospective extension alone was targeted for First Amendment analysis because it seemed inappropriate to claim that free speech was affected with regard to works that had not already been created (the prospective lengthening of the duration of copyright). Moreover, it is an established principle that copyright imposes certain acceptable restrictions on free speech.

In addition, College Art maintains that, because in the U.S. copyright exists to encourage creativity, arguably it seemed inappropriate for the Act to extend the duration of copyright in works that had already been created. It is hard to comprehend how artists who created the class of retroactively extended items—artists who have been dead, now, for fifty years—under the CTEA would be receiving any encouragement to create new works. The heirs may have been given additional time for exploitation—but that is quite different than being encouraged to create.

Many of us are suspicious of the validity of the European principle that copyright is an entitlement and a property that ought to be handed down through the generations. Our national ethic is (or was, anyway) uncomfortable encouraging the creation of long–lived hereditary estates. Constitutionally, copyright confers a bundle of rights. It is a temporary monopoly—the ultimate purpose of which is to serve the public good and promote progress by feeding the public domain–the contents of which, by the way, were originally simply called "public property." If the ultimate purpose of copyright is to serve the public good, it does this by recognizing the need to indulge private needs for a "limited time."

Many do not accept the argument that extending the period of copyright for this class of works encourages creativity or progress because it increases the right to exploit their economic potential. (Will artists refuse to create unless they get life plus seventy?) Anyone can exploit the potential of a work in the public domain. Indeed, the public domain encourages new creation because it promotes the formation of marketplaces where a variety of competing strategies can coexist by serving multiple needs and market strata simultaneously. The sooner a work becomes public domain, the sooner its influence can radiate through society, thereby fulfilling the Constitutional mandate "To Promote the Progress of Science and useful Arts." When the benefits of Copyright Extension are compared to the consequential loss to the public, the unfairness becomes apparent. While lengthy copyright may increase the incentive to exploit a work, it actually can decrease the incentive to create. Creators should not be encouraged to rest on their laurels through the mechanism of bestowing unnaturally long copyrights. The user communities believe it is time to say enough is enough.

"The College Art Association chose to address only the retroactive portion of the Act."

Copyright Extension forces the public good and the private good to clash head-on. The domain of works of interest to scholars often is quite distinct from the kinds of works that copyright extension was intended to protect. Moreover, the Constitutional mission to promote an informed citizenry is not coincident with exploiting works for their maximum return. Educators and scholars need access to, and use of works that frequently have no economic value; but lengthy and extended copyrights do not distinguish between works with and works without financially viable potential. By giving commerce the right to squeeze the last penny's–worth of value out of protected works, the ability of scholars and others to use works of significant cultural interest—works that do not easily reveal the provenance of intellectual ownership—works for which it may be impossible to obtain permission to use—works that often have no market value—is severely inhibited. Moreover, fair use doctrine tells us that the public interest should often outweigh the "exclusive" rights of copyright holders; but fair use, today, is distinctly dysfunctional. Copyright does not necessarily promote speech (as some argue). In these instances, copyright limits free speech in such a way that it is damaging to the success of our democratic mission.

"A COPYRIGHT EXTENSION FORCES THE PUBLIC GOOD AND THE PRIVATE GOOD TO CLASH HEAD-ON."

Finally, in choosing to target retroactive extension, it was felt that CAA's artist constituency would probably be more comfortable supporting an effort that did not challenge extension to copyright for works that they might create in the future.

In my opinion, so many scholars and teachers and artists are suffering the ill effects of lengthening the duration of copyright, that they would have gladly signed on to challenging the Act as a whole, believing it to be a law that sabotages the Constitution's

intent to balance private and public rights, but it was felt that the court may not look favorably on a constitutional challenge to the added length of new copyrights, based, in part, on their possible interpretation of the phrase "limited Times" as one that requires no more than each increment of each copyright extension be limited, and that making such an argument at this time might only serve to dilute the effectiveness of the tactic we chose to pursue.

We have been asked to discuss the impact this case may have on the arts community. The response depends, of course, on how it is decided. I'm told that those who closely followed the court arguments predict that Eldred has little chance of success. Accordingly, I think our discipline must consider what might be in its future under a regime where the duration of copyright can be extended in finite quanta indefinitely—not an altogether unlikely scenario. So you'll indulge me if today I just assume the worst, paint the blackest picture, pessimistic that mitigating factors, such as vast increases in the funding of scholarship and education for the payment of royalties, or that a new public–minded spirit will spread amongst those copyright owners whose goal it has been to harvest the maximum return, will emerge to temper the outcome I portray.

Projecting from current experiences, I suspect that the eventual consequence of an Eldred defeat will be wide–ranging and devastating. When combined with the power that the Digital Millennium Copyright Act has given to those who provide online access, and with the general fear of claiming fair use, a defeat will seriously change the face of teaching, art education, research and their supporting industries—in the end forcing art education to be subject to the laws of an economic jungle incompatible with its educational mission.

Already the added length of copyright has created virtual monopolies in works needed by educators. The threat is one that undermines our precious traditions of free access to information and the right of self-expression. Carried to its extreme, it is inimical to the principles of free expression we expect democratic societies to hold dear.

A government win may well embolden publishers and rights-holders. For instance, licensing might be used to chip away at our first sale doctrine, the theory that allows libraries to lend books they own. For allowing patrons to read books for free, publishers have already branded librarians with the "terrorist" epithet.

I see heirs of dead artists becoming ever more aggressive and vigilant in their efforts to squeeze every last sou out of each and every educational user. Fair use in the electronic environment will become only a memory, so that the only viable, institutionally sanctioned alternative to paying the fees requested might be to decide not to teach certain materials at all. Teaching modern art, and the ideas that spring forth from these works may falter—beginning with the less well-endowed departments. Heirs may decide that certain works will not be made available at all. As people become accustomed to paying usage fees, use of intimidation to induce payment of unwarranted or questionable royalties will increase.

Visual resources collections, so crucial to teaching, unable to claim fair use, will tend to be site-licensed, rather than owned. The distinction is fundamental. Owned collections encourage individual creativity and ingenuity. The individuality that has played such an important role in building collections will diminish. Institutions will have few rights that survive cessation of license. Without this guarantee, custom cataloging will disappear, too. Access to the visual documentation of untold numbers of faculty initiated scholarly efforts will be made unavailable or be proven incompatible with collection development guidelines.

In their efforts to control the economic vitality of their holdings, it will become ever more advantageous and feasible for rights-holders to regulate what is said about the works under their control. Admittedly, application of such thought-control won't be frequent, but when it does occur, it will tend to poison the well so that scholars, finding some areas less hospitable to their creative input, may eventually lose interest and focus their attentions elsewhere. Works that are available primarily to educators will tend to be those pre-selected by site-licensors. Without other sources, the incentive to teach creatively will be diminished, thereby. The practice of art history could easily drift imperceptibly from a calling to understand society to a kind of art appreciation, based on the familiar so-called key monuments—the pictures of which will be in sufficient demand to make their widespread distribution economically feasible. In a license-only environment the process of collecting teaching images for seminars and specialized courses will become a forbidding and expensive endeavor.

When creative artists are no longer comfortable relying upon fair use, and when the public domain, as a universal resource, is receding ever further from their grasp, those remaining remembrances of events, ideas and trends and the aesthetic solutions that others have developed to represent them—the raw

materials of visual creation—will struggle hard to manifest themselves in new art. Removal of the cultural fodder from which all creation germinates will bequeath an ironic legacy. Under such circumstances art will be encouraged to say more and more about nothing and less and less about something. Thus, in the extreme, creative artists, wary of the hazards of incorporating the lessons from the present and near past, will have to invent new creative strategies—not as a means to enable self-expression, or for exploring their aesthetic goals, but rather, as a way of avoiding minefields laid for them by our legal system.

Under such a regime, the vitality of our artistic environment may fade and what passes as quality may be more closely allied to the achievement of financial viability, giving added weight to the significance of ephemeral trends and fashions. As the creation of new works becomes weighed down by the responsibility of tracking and identifying sources and paying royalties, only those who have resources will be able to afford to create in the traditional manner. Many of these creators won't be able or willing to take chances. When art becomes overly involved with the administration of rights, we may lose the flow of folk artists, and others who periodically rise from America's grass roots.

With so much at stake, or due to the high cost of "infringement insurance," success must be pre-assured; artists may need publicists. Quality and profundity may no longer be serviceable goals when competing with the guaranteed benefits of popularity. Thus, it is possible that art creation and art commentary may lean toward becoming the same kind of synthetic product that has taken hold of the cinema and popular music industries. Works of art may become the products of studio mentalities. Scholarship and spin at times may be indistinguishable. Our reliance on authority and authenticity at times will be undermined.

Unbridled monopoly tends to foster disrespect. As the public domain recedes ever further from our grip, faith in the copyright bargain will also fade. Because no longer will there be an apparent quid pro quo in the bargain, the institution of copyright, itself, will fall into disrepute, and will doubtlessly spawn an underground of copyright deniers whose currency is cynicism and distrust—a paradoxical effect. These artists and scholars and resource curators whose furtive expressions and creations and collections at best will ignore copyright, when uncovered, no doubt will be vilified by the copyright industries as thieves, pirates and terrorists—no matter how noble their aims.

That's the trouble with market fundamentalism (and all fundamentalisms); they rarely look at the big picture and are unlikely to account for the complexities of human needs and values. They breed intellectual isolationism and disassociation—their adherents failing to acknowledge debt to society. The isolationism bred by economic fundamentalism threatens creativity. In the end, the Eldred challenge may fail; copyright extension may be judged to be legal; but, if it is, at some point it will unveil itself as very bad public policy.

But what if the prognosticators are wrong, and the Court favors Eldred? On its face it would seem that not much would change. Perhaps the term of copyright will be held fast to death plus fifty years. If so, creeping copyright escalation might end and works will begin to enter the public domain as they were once scheduled. Yet, the forces seeking to end all "market failures" (the industry code term that includes "fair use"), will continue, trapping scholars in an ever more finely woven net of restrictions and prohibitions.

"It's unlikely; but what if the Court goes further and uses this opportunity to define a theory of the public domain, giving teeth to the assertion that the public domain is public property; . . . and copyright is but a temporary license given by Congress..."

It's unlikely; but what if the Court goes further and uses this opportunity to define a theory of the public domain, giving teeth to the assertion that the public domain is public property; indeed, affirming that all works are born belonging to the public, and copyright is but a temporary license given by Congress in order to secure "for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In that case, it would not be so easy to treat the public domain as an undefined wilderness, there for unbridled exclusive exploitation by intellectual property colonialists. If this happens, the world of expired copyrights might come to be understood, not as a repository for useless works and "orphans," but as a nourishing, fragile and valuable public resource that needs government support and protection, a resource that must be treated as a public trust, a resource that cannot be given over to exclusive private interests without due process of law and without equitable compensation to the public for their loss.

THE CASE FOR COPYRIGHT TERM EXTENSION

I. FRED KOENIGSBERG*

Let me say at the outset that about the only thing that I disagreed with in Alice Haemmerli's discourse was whether the Copyright Term Extension Act [CTEA] is good public policy or not. I happen to think it *is* good public policy, and I'll tell you why in a second. But the question before the Supreme Court is not whether it is or is not good public policy, but rather whether it meets the constitutional requirements.

It was my privilege to file a brief in favor of the CTEA on behalf of sixteen very distinguished symphony and concert composers: Jack Beeson, who is an Emeritus Professor of Music at Columbia University, Chen Yi, John Corigliano, John Duffy, Harold Farberman, Philip Glass, Adolphus Hailstork, Jennifer Higdon, Libby Larsen, Tania Leon, Stephen Paulus, George Rochberg, Ned Rorem, Augusta Read Thomas, Melinda Wagner and Richard Wernick. Four Pulitzer Prize winners, an Oscar winner, Grammy winners, everyone of them having achieved huge awards and recognition in their field, and most of them in desperate financial straits, because that's the fate of symphony and concert composers in our society. Sad but true. When I called them to ask them if they wanted to join in a brief supporting the Copyright Term Extension Act, everyone of them, said: "Are you kidding? Of course! I would be nuts not to join in that brief. Because I believe fervently in the protection of what I created for myself and for my family."

"THE MOST PASSIONATE ONES IN FAVOR OF THE COPYRIGHT TERM EXTENSION ACT WERE NOT THE PUBLISHERS, BUT THE INDIVIDUAL CREATIVE ARTISTS, BECAUSE THEY WANT THEIR CREATIONS TO BENEFIT THEMSELVES AND THEIR FAMILIES."

I am also General Counsel of ASCAP (the American Society of Composers, Authors and Publishers). ASCAP's Board of Directors consists of twelve writers, that is to say twelve composers or lyricists, and twelve music publishers. The most passionate ones in favor of the Copyright Term Extension Act were not the publishers, but the individual creative artists, because they want their creations to benefit themselves and their families. Compare that to someone who starts a business, builds a factory and passes away. What does that person leave to his family? Savings maybe, his house and so on maybe, but also the business. What does an individual author leave to his family when he passes away? What does an individual artist pass to his heirs when he passes away? Art, because that's all that they have.

Let's talk about the policy behind the Copyright Term Extension Act. I really want to focus on two points in the policy discussions that went on before Congress for five years. It wasn't just one year. There weren't just two discussions. There were many. Just two points: one theoretical point, the other a practical point. In theory, the internationally recognized standard of copyright law is that it should exist for the life of the author and two generations after the author, so that the author has something to leave to his children and grandchildren. That is not an outrageous thought. We are talking about property rights, rights of a creator in the property that he or she has created. The purpose of the copyright law is to give those economic property rights.

So, what's the theoretical basis for the term of copyright being the life of the author and two generations? The internationally recognized standard at the turn of the 19th to the 20th century, a hundred years ago, was life plus fifty years. What has happened in the hundred years since then? Life expectancy has increased. When the term is based on the life of author, however long the author lives is taken care of. But for the two generations thereafter? If you look at the actuarial tables, you'll find that the increase in life expectancy for those two generations over the past hundred years is about twenty years, so that there is the theoretical basis for doing what Congress did, which Congress was very much aware of.

"There was also a practical reason why Congress thought term extension was a good idea, namely the 1993 action of the European Union harmonizing the copyright term within their common economic market, at life plus seventy years."

There was also a practical reason why Congress thought term extension was a good idea, namely the 1993 action of the European Union harmonizing the copyright term within their common economic market, at life plus

*I. Fred Koenigsberg, Esq. is a partner at White & Case, LLP and General Counsel, ASCAP. He filed an amicus brief on behalf of sixteen symphony and concert composers in support of the Copyright Term Extension Act.

seventy years. Europe is the largest trading partner of the United States. American copyrighted works—art, music, books, motion pictures—are far more popular overseas than foreign works are popular here. American music, American movies, American books, American art are greatly desired in other countries. Europe was not going to grant American works a term of life plus seventy years, unless the United States granted their works a term of life plus seventy years. And so if those additional twenty years of protection were lost to American works of art in the European Union, what would happen? There would be twenty years less revenue flowing into the United States because copyrighted works are an export product of the United States. We have a trade surplus. If our entire balance of trade looked like the economic balance in copyrighted works, this country would be in fabulous economic shape. But without term extension, we, the United States of America, would lose that revenue. Not only would authors and their families lose that revenue, but jobs would be lost, whole industries would be lost. Congress was persuaded by that. You may disagree or not, but it was looked at in great detail by the United States Congress, which was persuaded that there was a good practical reason to do what it did.

I want to read two things to you regarding the definition of the public good and the purpose of the copyright law. One of them is a statement by the Supreme Court in 1955 in a case called *Mazer v. Stein*. The Court wrote:

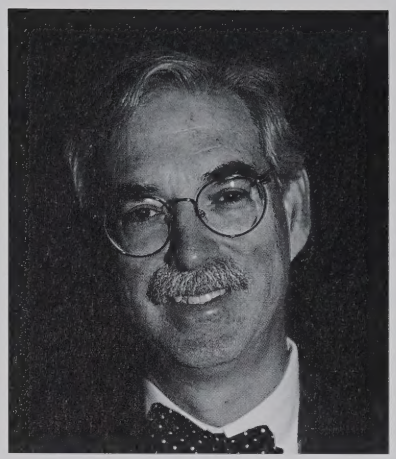
> The economic philosophy behind the clause empowering Congress to grant patents and copyright is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in science and useful arts.

I don't think there is any author, any artist, any creator who would disagree with that. And the Supreme Court continued:

> Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

And I don't think any artist would disagree with that either.

But let's go back in time to the drafting of the Constitution. As you all know, John Madison, John Jay and Alexander Hamilton wrote the Federalist Papers to gain support for the Constitution. What did the Federalist Papers have to say about the Copyright Clause of the Constitution? Very little. Just one thing. They wrote: "The utility of this power—that is the power of Congress to determine what copyright should be and to grant those rights—will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of Common Law. The right to useful inventions seems with equal reason to belong to the inventor. Public good fully coincides in both cases with the claims of individuals." So when I hear the parade of horribles—what if this and what if that and what if the other thing?—all I can think of is the story of a little village that was situated in the border between Austria–Hungary and Russia a few hundred years ago. The villagers are just milling around, when one day a rider rides up: "I have big news, important



I. FRED KOENIGSBERG
IFAR Evening, November 6, 2002

news!" They all cluster around: "What is it?" He says: "There has been a Treaty. We are no longer in Austria–Hungary, we are now in Russia." And the villagers go: "That's terrible! That's horrible!" Then the rider says: "Why is it so horrible?" And the villagers say: "Do you know how harsh those Russian winters are?"

Every case has a back story, and I want to give you just a little bit of the back story of this case as it emerged in the oral arguments in the Washington DC Circuit Court, and then I want to tell you about the oral argument in the Supreme Court. In the briefs before the DC Circuit, all the arguments were: this is bad policy, this is no good, all the things that Alice Haemmerli went into. And Professor Lawrence Lessig, who later argued the case for the plaintiffs before the Supreme Court, was standing up before the circuit court's three judges and he was having a hard time with it. Judge Sentelle, who is an extremely conservative judge—this is significant—said: "Well, Professor Lessig, is there any argument that you didn't make in your briefs but that somebody in the amicus briefs made on your side that you think we should pay attention to?" This, in the legal profession, is

known as "being tossed a marshmallow." Professor Lessig grabbed at that question as a drowning man would grab at a life preserver. And he said: "Well, there is an argument in the brief of the Eagle Forum which Mr. Jaffe wrote that I think is significant." The Eagle Forum, by the way, is the group that Phyllis Schlafly heads, and it is an extremely, extremely conservative group. The argument they made was that the words, the precatory words of the constitutional clause, actually form a substantive limit on the power of Congress. That was the argument that Professor Lessig echoed, and that was the argument that Judge Sentelle bought in his dissent. Why does the Eagle Forum, a group concerned with abortion rights and all the rest, care about copyright? I would submit to you my personal opinion: they don't. What they care about is limiting the power of the Federal Government, of the Congress to legislate in areas like civil rights and environmental laws. You don't have to take my word for it, I can prove it to you. Because there were two recent Supreme Court decisions in which they argued that the Commerce Clause of the Constitution should be limited in terms of what Congress can do. The Eagle Forum prevailed: the Supreme Court said that Congress had gone too far under the Commerce Clause as a justification for federal legislation, and struck down the Violence Against Women Act, and an act that prevented the carrying of guns within such and such a distance of any school. So I believe that the Eagle Forum looked upon this case as a means of further limiting the power of Congress, not because they care about copyright, but because they want to use that jurisprudence to attack other laws that they really do care about.

THE ORAL ARGUMENT

What happened at the oral argument at the Supreme Court is enlightening. Let me recount some of it, and I will try to do it in an objective way. First, Professor Lessig, arguing for the plaintiff Eldred, got up. He didn't get a sentence into his argument before Justice O'Connor jumped on him. She said: "Well, you know, there have been many term extensions since the Constitution—there was a term extension in the 1790 Copyright Act, in the 1831 Copyright Act, in the 1909 Copyright Act and in the 1976 Copyright Act. Why are you coming to us now?" It got to the point where Professor Lessig had to admit in a question that I think Justice Kennedy posed to him: "If this Act is unconstitutional, then the 1976 Act is unconstitutional, and so on and so on going all the way back." Justice Ginsburg tied him up in knots in the First Amendment argument and got to the point where she said:

> Look, if you don't prevail on your Copyright Clause argument, your First Amendment argument cannot prevail either, for all the reasons that I have been giving: the First Amendment protects the dissemination of ideas, copyright allows the dissemination of ideas, just protects the expression of ideas and you have the safety valve of the fair use doctrine and other doctrines in the copyright law.

I confess I was concerned about the Commerce Clause-type argument. Chief Justice Rehnquist addressed that. He asked Professor Lessig: "What's different now with this term extension as compared with previous ones?" And Professor Lessig answered: "The Internet." He said: "The Internet is this new means of dissemination, this new means of distribution of works and the Founding Fathers never could have had the Internet in their mind when they wrote the Copyright Clause." To which the Chief Justice responded: "Well, the Founding Fathers didn't know about railroads or steamboats either, but there is no question that the Commerce Clause covers them."

I think it is fair to say that my analysis of the Supreme Court argument is that Professor Lessig was really, really pressed hard by Justices Kennedy, Souter, O'Connor, Ginsburg, and the Chief Justice. Then, Solicitor General Olson got up to argue on behalf of the Government, and he was pressed hard by Justices Breyer and Stevens. Justice Breyer pressed him with an economic argument. He said: "I can see the benefits to copyright owners. I've done some calculations. That's x billion dollars. But I can't see a concomitant benefit to the public in

"My analysis of the Supreme Court argument is that Professo Lessig was really, really presse hard by Justices Kennedy, Soute O'Connor, Ginsburg, and the Chief Justice. Then, Solicitor General Olson got up to argue o behalf of the Government, and h was pressed hard by Justices Breyer and Stevens."

economic terms." To which the Solicitor General responded: "Well, I think some might differ with you on that, but isn't that a decision for Congress to make, not for the Court to make?" Justice Stevens pressed him on the issue of why should copyright be extended for existing works. This is the argument that you have heard tonight. If the purpose of copyright is to encourage the creation of new works, why should you extend the terms of works already created? They have already been created. You can't encourage creativity that way. And the Solicitor General responded by saying: "Well, certainly the creation of new works is an important purpose of the copyright law, but there are other purposes as well. You want to encourage investment in works, the dissemination of works. You want to encourage their distribution. Indeed, you want to encourage the preservation of works."

An article by the editor of *Wired Magazine* said: "You don't need to preserve films because hobbyists will do that on the Internet. They'll digitize the films and put them up there just for the love of it all!" Of course the problem is that to digitize a film, you have to have a really good copy of it, and to have that when you are talking about the old nitrate–based films from the twenties and the thirties that are disintegrating, you have to invest a lot of money to put them onto decent film stocks so that they can be digitized. There was no discussion of how that money was going to materialize. Those are the intellectual gaps, I think, surrounding a lot of arguments involved here. That was the answer that the Solicitor General gave to Justice Stevens.

I have lots of clients who ask me what is going to happen, and my only answer to them is the answer that Muhammad Ali gave after he knocked out George Foreman. He said: "Whatever fights I may have in the future, I'm through predicting." I don't quote odds. We'll see what will happen. I'm with Frank Feldman on this one. There is nothing to be gained and everything to be lost by making a prediction. I have given you the tenor of the questioning. We'll see what happens when the Supreme Court comes down with a decision, which I would guess will be well after the first of the year (2003).

(more)

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COPYRIGHT OR COPYWRONG?

Q & A

Q FRANK FELDMAN (FF): Fred, let me ask you a question that I have not heard raised before, either in the briefs or at the Supreme Court. You agree that there is a difference between the creator—the person who created the song, the book—and a third person. The Constitution says that the exclusive rights belong to the author, not to anyone else. Let's read the Constitution very literally, as the Supreme Court is likely to do. Why should an assignee, a person who acquired the copyright as work for hire, Walt Disney, Inc., have an exclusive right or have the same right as Mr. Walt Disney? Why should an assignee, the company, have the only right that goes on so lengthily?

A FRED KOENIGSBERG (FK): For the answer, I draw from the text of my Bible: the copyright law of the United States of America. And it should be in every home. Actually, if I had a chain of motels, I would put this in the drawers. The copyright law says, in Section 201—

FF: But Fred, I am talking about what the Constitution says. That's what *I* keep in mind.

FK: Yes, I know. I *am* answering the question. The copyright law says: "Initial Ownership. – Copyright in a work protected under this title vests initially in the author or authors of the work." Now, two questions flow from your question. The first is: what happens if the author assigns, transfers, sells his or her copyright to somebody else? This happens all the time. I know of no author of literary works who has the wherewithal to publish, disseminate, market his or her great American novel. I know of no songwriter who has the wherewithal to place his work on records, get it into motion pictures, and so on, without the aid of a business entity. There is no question that the constitutional provision granting rights to authors also means that the authors can sell their property and the property will still exist. Indeed, the copyright law says that the author, when the author transfers a work, can recapture the right from whomever he or she has assigned it to, notwithstanding any contractual agreement to the contrary. So the notion that the copyright law doesn't protect authors in terms of assignments simply doesn't fly.

The second prong of your question has to do with the work made for hire doctrine. Every creative work, without exception, is created by a human being. But I think we all would agree that there are circumstances where whoever created the work should not own it. Example: Black & Decker makes toaster ovens. Should the person on staff who wrote the instruction manual own the copyright in the manual or should Black & Decker own it? Everybody would agree that Black & Decker should own it. How do you get the copyright into the hands of Black & Decker? You can do it in a number of ways:

1) You can make it a condition of employment: anything you write you hereby assign to us;

2) There can be an implication in the law, what's known as the shop right: anything you create while you are on duty for us, that's ours; or

3) What the United States copyright law has done: the work made for hire doctrine, which says that the employer or the person for whom the work was created is deemed to be the author. That's a nice legal fiction, but it certainly comports with the constitutional requirement that copyright be in the hand of authors.

Q THEODORE H. FEDER (TF): I am head of Artists Rights Society, which represents a number of individual artists, not corporations, who run the gamut from Matisse, Chagall, Miró and Picasso in Europe to Frank Stella, de Kooning and Jackson Pollock in the United States. All of these individuals or their estates or their foundations which run their estates are in favor of the copyright term extension. Many see the extension as a very belated corrective to what has been a confiscatory American copyright policy as regard to their works. Previous laws and even the Constitution itself visualized the application of copyright to writers of books. They did not consider the effects of the U.S. copyright law on visual artists. An artist produces hundreds of works in a given year if you include designs, drawings, preparatory sketches and so on. For years, the U.S. publishing industry and American

museums had deprived works by American and European artists of copyright protection because the United States is the only industrialized country which has applied formalities to copyright recognition. In other words, it said: you must apply the copyright notice every time you reproduce a work or register your renewal, or you are not going to have a copyright. Museum and institutions have taken advantage of this. Our members, especially the Europeans but even the Americans, never dreamt that they would have to put a copyright notice on their works when their creations were reproduced. Picasso and Matisse, working in Paris in the fifties, forties, and thirties, would never dream of having to do this. Furthermore, they were required to send registration forms to the United States Copyright Office, spend time filling out the forms for hundreds if not thousands of works, and pay a fee each and every time. So, far from viewing these artists as having exploited their copyrights without justification for years and years, for most of them, there had been very little exploitation, until recently, when they began doing so in the U.S. because of the copyright restoration provisions of the TRIPS Accord attached to the URAA Uruguay Round Agreements Act of 1994, which implemented GATTI, as well as through Copyright Term extension.

Also as head of Artists Rights Society, addressing Mr. Baron if I may, I know of no time that we have ever impeded or blocked an artist from copying the work of one of our members, provided he identifies it as one of his own works, and not the work of one of our members. Or provided he didn't commercialize it or reproduce it in multiples.

Lastly, Mr. Baron strongly stated that those people who protect copyright are in fact killing your industry. Scholars can't do their work. Art history is going to vanish. I'm an art historian...I don't teach it now. Art history became a university subject only after those with the monopoly interest in photographs—think of the Alinari brothers of Florence, Italy—began for the very first time to photograph works of art in different collections, first in Italy and then elsewhere in Europe. When these photographs became available in books, it became possible for the first time...to compare and contrast works based on photographs. Prior to that...art history was the province of well to do people who could afford to travel to the works. Alinari charged a fee for this; Alinari still exists; Alinari still charges a fee. Had they not been able to obtain that fee, the dissemination of their photos and the exponential growth in the discipline of art history would not have occurred. The same is true of the people who have made slides over the years, which are used for teaching purposes. So, far from really destroying the discipline, it has really given rise to the discipline.

Q SHARON FLESCHER (SF): I would think that your last point, about someone taking photographs of works and distributing them, albeit for a fee—which no one here is objecting to—is the very argument in favor of having those initial images available for photography and reproduction.

ATF: My point is that they would have never been available had they not been privately taken and offered for a fee. Alinari would have ceased functioning.

Q SF: But what if Alinari hadn't been able to take the photos and reproduce them in the first place, because the works were not in the public domain?

ATF: [Actually] the Director of the *Uffizi* at first denied permission for Alinari to photograph, saying: "What is going to happen to the poor copyists, who are copying by hand? They'll lose their jobs." This is a very touching argument. Eventually, the *Uffizi* gave permission, as did many other museums. Alinari's photographs were copyrighted as well. Incidentally, the European system of copyright, certainly since the Berne Convention of 1883, has been that works are copyrighted automatically, at the instant of their creation. Only the American approach to copyright has historically required various formalities, which have served to deprive creators, especially visual artists, of their rights.

Q SF: At IFAR, I am very torn. As an art historian, I want ready access to images, whether for the *IFAR Journal*, for lectures or whatever. And we always ask formal permission. But our journal has a © on every single page because I am so concerned about people misusing our material. The question is not so much: is a work copyrighted and will someone give you permission, but what fee are they charging for that permission, and how difficult is it to get it? I can tell you, we pay through the teeth for images, and we are just a little nonprofit. Twentieth–century art is obviously the main problem, and it's complicated by the fact that not only do the copyright holders of the image charge, but then the museums that have the works in their collection also charge. You pay on both sides of the fence, something that I find, frankly, unconscionable.

ATF: Well, that's an argument with museums. ARS does recognize fair use in many cases, and we will waive our fees.

ROBERT BARON (RB): Ted's history of the role that copyright played in creating the discipline of art history is correct. I certainly hope that no one heard my talk thinking that I was against copyright. I believe that there is a balance that has to occur between the protection of works, which helps create them, and then their eventual movement into the public domain, so that people can use them. A lot of the examples that I gave in the beginning did not criticize the "concept" of copyright, but rather the inappropriate use of copyright. For example, one historian was refused permission to publish a picture of a work which is commonly published by other people, but the heirs in that situation didn't like what she had to say about the work in the past, so they refused to give her permission. In the brief that the College Art Association submitted, there are examples of people who own the rights to works using those rights to control what is being said.

TF: I would agree with you that that is a deplorable practice.

RB: Sharon pointed out that the costs of reproducing works in journals is skyrocketing. One of our authors, who had produced a book on modern art, was going to come out with a second edition. And, of course, all of these scholars pay for the permission themselves; the publishers don't pay for it anymore. He was going to add new material and also reproduce some of the works that he had reproduced before. The second edition rights sky rocketed because, as a second edition, the people who control those rights seem to think that they have the author over a barrel.

TF: The scholar's argument there should not be with copyright owners but with his publisher. If the publisher, be it a Random House or Abrams, which at one time paid for photo rights, forces the author to pay for those rights, the author should do what he can to resist. It's difficult, I understand that, but why give the publishers a free ride and apply all of their frustration...at the copyright holders?

RB: Well, you know, it's a 'round robin' situation because the scholars don't have much choice. They *have* to publish, whether they make money or not. Usually they lose money.

QTF: Why doesn't the CAA as a group address the publishing fraternity and make it...

ARB: Because the publishers won't publish.

TF: Well, they have to live too. And they need the scholars for their books.

FK: Just two brief observations. Number one, going to your point, Sharon, about the *IFAR Journal*. ASCAP's job is to license the rights of public performance of its member's music, or the songwriters, or music publishers, collect those moneys, and distribute them to their members based upon the amount of times that their works are performed. So they license radio stations, TV stations, and so on. ASCAP's chief economist once commented that he never met a user who thought he was paying too little money, and he never met a member of ASCAP who thought he was getting too much. That's a nice balance. Why don't we just leave it at that?

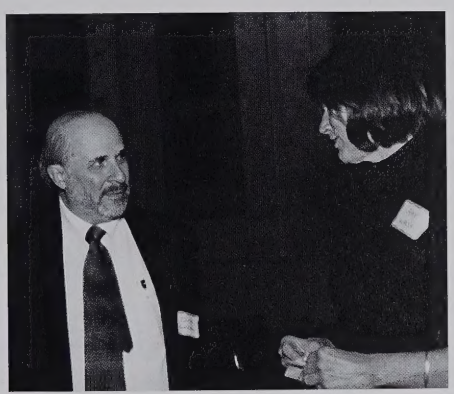
QSTEPHEN WEIL(SW): I want to ask Fred to fast forward to 2018, and Mickey Mouse is on the verge of public domain again. I recall the words that Peter Jaszi used in testifying in 1995 that he was fearful that we face what he called "permanent copyright on the installment plan." What is going to be different in 2018? Would there be any more or less power on the parts of various people? Do you see anything in the Constitution that blocks a further twenty-year extension at that point?

AFK: Well, a couple of points. Number one, this parade of horribles is interesting but doesn't have any basis in history. After all, from 1978 to 1998 works went into the public domain each and every year. So the notion of what happens if this happens again? Well it didn't happen again in the past. The extensions of term have been very periodic. That's one answer. The second answer I would give as to what's different in 2000 and 2023 (when Mickey will actually go into the public domain) is the discussion that is being had today. Congress recognizes, or probably will recognize I think, what the result of *this* term extension has been, wise or unwise as it may be—in Congress's eyes, wise. I don't think that they are going to lay themselves open to this again. The third answer is that I think, and this is my personal opinion, there does come a point when the duration of copyright term becomes, even though technically limited in time, the functional equivalent of an unlimited term. I don't think "life plus fifty" did that. I don't think "life plus seventy" does it, but I do think there does come a point. If you ask me where the line is to be drawn, I can't answer that question, but I think that, too, will restrain Congress from doing anything untoward.

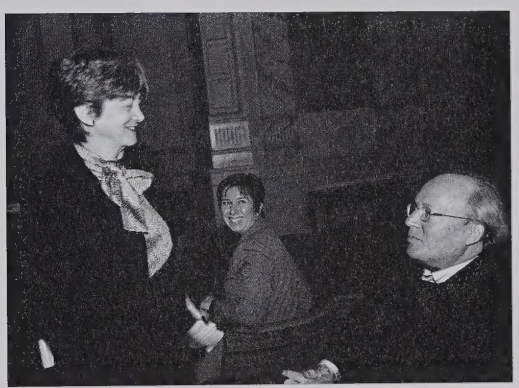
AN IFAR EVENING ON COPYRIGHT

Gloria and Bert Abrams

Cindy Fanelli



Charles B. Goldstein and Amy Walsh



Left to right: Gail Aronow, Cynthia Wolff, and Eric Kaufman

Left to right: Caroline Goldsmith, Ruth Bowman, and George Bookman

Andrew Jackson and Alex Yastremski

HOLOCAUST–ERA LOOTED ART: THE ROUTES INTO THE U.S.

LUCILLE A. ROUSSIN*

INTRODUCTION

It is now internationally acknowledged that vast quantities of art were looted during World War II, and that some of the looted art was not restituted to the owners. Any estimate of the numbers of stolen artworks must remain speculative; however, some estimates put the figure at 600,000 works of painting, sculpture and tapestries, of which anywhere from 10,000 to 100,000 works are still missing.[1] Although this number seems extraordinary, the Presidential Commission on Holocaust Assets in the U.S. estimated the total number of art objects of *all* categories restituted by the U.S. and the Allies between 1948 and 1951 as 6.3 to 7.5 million objects with a value of $2.1 to $2.2 billion.[2] This successful restitution of millions of looted art objects during the immediate postwar period was extraordinary and was accomplished through the application of international law and a legal system that controlled both internal (within Germany) and external restitution. Despite this success, not all looted objects were restituted.

The purpose of this article is to examine how some of the looted art may have entered the U.S.

LOOTED ART IN THE U.S.

The popular interest in the fate of the art looted during the War is due, at least in part, to the current market value of high quality art. But it must be borne in mind that during and immediately after World War II artworks—even of the best quality—were not very expensive. The dramatic escalation of prices of art began in the 1960's and reached its peak in the late 1980's. As Gerald Reitlinger has noted:

> The market remained rationed until at least 1951. In the previous years heavy price rises could only be sustained by purely native or resident buy ers in such protected areas as the U.S.A. In the early fifties it was still said that the cheapest thing you could buy was a work of art...Nor were the prices of the later fifties, particularly the prices of nineteenth and twentieth–century French art, altogether the 'coup de foudre' which the popular Press made them to be.[3]

Despite the statements of many museums, art dealers and other art professionals that the number of looted artworks in the U.S. is minuscule,[4] the truth is that we have no idea how much looted art made its way into the U.S. between 1933, the date of the first German anti–Jewish laws or September, 1935, the date of the more punitive Nuremberg Laws, and

*Lucille A. Roussin is an attorney with McCallion & Associates in New York City and an Adjunct Professor at the Benjamin N. Cardozo School of Law. She also holds a Ph.D. in art history and archaeology. A variation of this article entitled "Holocaust-Era Looted Art: How the Past Became the Future" was given at the American Bar Association, Section on International Law and Practice, 2002 Spring Meeting, May 8–11, 2002, New York City.

1 Statement of Jonathan Petropoulos before the House Banking Committee, U.S. House of Representatives, Hearing of February 10, 2000, available at http://www.house.gov./banking/21000pet.html.

2 *Plunder and Restitution: The U.S. and Holocaust Victims' Assets*. Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the U.S. and Staff Report. U.S. Government Printing Office, Dec. 2000 at SR–8 [hereinafter *Plunder and Restitution*]. I served as one of the two Deputy Directors of the Commission's Art and Cultural Property Team from June, 1999 until March, 2000.

3 Gerald Reitlinger, *The Economics of Taste* (New York, Chicago, San Francisco, 1961), p. 220.

4 "[T]he United States never became a repository for looted or recovered property." E–mail correspondence between Stephen Clark, Deputy Counsel, the Museum of Modern Art, and James Fitzpatrick, Arnold & Porter, circulated via intcultprop@mail.abanet.org. "Spoliated property was neither looted in the U.S. nor sent to the U.S. for restitution. As a result, there is very little Nazi-looted art in the U.S." Letter from James Cuno, President, Association of Art Museum Directors, Director, Harvard Art Museums, to Professor of Law Marilyn Phelan, Chair, ABA Cultural Property Committee. "American museums did not participate in the plunder of Jewish collections in Europe during the Nazi era, nor were works, recovered but unclaimed, deposited with them at the end of the war." Statement of Philippe de Montebello, Director, The Metropolitan Museum of Art, at a Hearing of the Presidential Advisory Commission on Holocaust Assets in the United States, April 12, 2000.

the end of American occupation of Germany and Austria in the 1950's. Indeed, Theodore Rousseau, a former officer in the OSS who became a curator of paintings at the Metropolitan Museum of Art, advocated the acquisition of recovered artworks:

> America has a chance to get some wonderful things here during the next few years. German museums are wrecked and will have to sell... think it's absurd to let the Germans have the paintings the Nazi bigwigs got, often through forced sales, from all over Europe. Some of them ought to come here, and I don't mean especially to the Metropolitan, which is fairly well off for paintings, but to museums in the West which aren't.[5]

". . . the truth is that we have no idea of how much looted art made its way into the U.S. . . ."

This sentiment was rejected by those working in the Munich Collecting Point, and, ultimately, by the State Department.[6]

Because so little has been published about the efforts to contain the trade in Nazi-looted art, the focus of this article is an examination of the laws and procedures in effect in the U.S. during World War II and the immediate postwar period. Despite their best efforts, the control mechanisms set in place by the U.S. government here and in Europe failed to completely stop the trade in looted art.[7]

UNITED STATES CUSTOMS

All works of art imported into the United States are subject to Customs regulations. Although original works of art may be imported duty free, all such objects and their value must be declared at the time of entry.[8] The failure to declare an art object, or a false declaration of the country of origin or value, is a federal offense and the object is subject to forfeiture.[9] Because of the liberal laws regarding the import of works of art, there was great concern during and immediately following the war that the United States would become a major port of entry for looted art. In order to prevent this the federal government, at the request of the Roberts Commission,[10] promulgated Treasury Decision (T.D.) 51072.

On July 8, 1944, T.D. 51072 was enacted under sections 3(a) and 5(b) of the Trading With the Enemy Act, and provided a procedure for the sequestration of art objects imported into the United States pending a review by the Roberts Commission.[11] Under §52.12 of T.D. 51072, "no art object hereafter imported from any foreign country, except one which constitutes a part of Dominions, or British Colonies, shall be released from customs custody,

"On July 8, 1944, T.D. 51072 was enacted . . .and provided a procedure for the sequestration of art objects imported into the United States pending a review by the Roberts Commission."

whether for consumption or exportation, or shall be sold or forfeited under the customs law and regulations, unless such release, sale, or forfeiture has been licensed or otherwise authorized by the Secretary of the Treasury.[12] Also exempted from inspection were shipments from the neutral countries and Latin America. The importer was obliged to submit an application (Form TFE–1) and a report on the nature of the work and the circumstances of its acquisition (Form FFC 168).

Under T.D. 51072 the definition of an "art object—included objects worth $5,000 or more, and objects of artistic, historic, or scholarly interest irrespective of monetary value and of one of the following categories: (a) paintings in oil, mineral water, or other colors, tempera, pastels, drawings and sketches in pen, ink, pencil, or watercolors, engravings, woodcuts, prints, lithographs, miniatures; (b) statuary, sculptures; c) chinaware, glassware, pottery, porcelain; (d) rugs, tapestries, laces and other textiles; (e) jewelry, metalwork; (f) books, manuscripts, archival materials and records; (g) furniture; (h) curios. The "either/or" provision of the law, *i.e.*, art objects worth $5,000 *or* of artistic, historic or scholarly interest, reflects the fears of members of the Roberts Commission that objects of great

"OBJECTS FROM — THE UNITED KINGDOM, THE BRITISH DOMINIONS, [AND] BRITISH COLONIES [WERE EXEMPTED] . . . ALSO EXEMPTED WERE SHIPMENTS FROM THE NEUTRAL COUNTRIES AND SOUTH AMERICA."

5 Lynn Nicholas, *The Rape of Europa* (New York, 1994), p. 439.

6 *Ibid.*

7 The subject of fakes or forgeries that entered the U.S. is yet another issue. *See e.g.* Greenwood v. Koven, 880 F. Supp. 186 (S.D.N.Y. 1995).

8 Tariff Act of 1930, §§501, 503 as amended 19 U.S.C.A. "1501, 1503 (1937 edition)

9 18 U.S.C. 542.

10 The American Commission for the Protection and Salvage of Artistic and Historic Monuments in Europe, better known as the Roberts Commission, was established in July 1943.

11 *Treasury Decisions Under Customs and Other Laws* July 1943–December 1944 (Washington, D.C., U.S. Government Printing Office: 1945) 247–48; 9 FR 6239 (June 8, 1944).

12 T.D. 51072, §52.12.

scholarly—or even sentimental—value would be excluded if the monetary threshold was set too high.

If the measures taken in the port of New York are representative, the enforcement of T.D. 51072 was complex. If it appeared to the entry clerk that the objects being imported were subject to T.D. 51072, the objects were sent to the Appraiser for further examination. If the Appraiser found that the objects might be subject to T.D. 51072, he notified the Entries Division to secure all items in the shipment. The director of the Entries Division then referred the matter to the Solicitor's Office, which dealt with the importer regarding the license. The importer applied to the Federal Reserve Bank for Forms FFC–168 (the questionnaire) and Form TFE–1 (Foreign Funds license). The papers were then sent to Foreign Funds Control in Washington and copies, with photographs where available, were submitted to the Roberts Commission for approval. The process was flawed: Actual control depended on the individual inspectors and could not be regarded as watertight, especially in those cities without specialized [art] sections.[13] Moreover, Irving Savell, legal advisor on special war problems within the jurisdiction of the Customs Collectors Office in New York, advised John Gilmore of the Roberts Commission that Form FFC–168 (questionnaire) did not provide enough information and offered to provide the Commission with the Appraiser's report, which would include the description of the object and its value.[14] In order to implement this suggestion, permission had to be

"THE PROCESS WAS FLAWED: ACTUAL CONTROL DEPENDED ON THE INDIVIDUAL INSPECTORS . . ."

"a number of art objects simply slipped through customs without inquiry."

obtained from Foreign Funds Control in Washington and with the Bureau of Customs. This does not seem to have been accomplished because Form FFC–168 does not appear to have been changed.

The files contain several applications for the import of artworks under T.D. 51072, but there is no exact listing of the paintings in question, nor any indication in the correspondence as to whether they were actually suspicious, and no information as to the final disposition of the works held for further information. For example, on April 22, 1946 the Treasury Department requested an opinion on the import of six paintings by Marc Chagall valued at a total of $37,500 and shipped to the Museum of Modern Art in New York by the Stedelijk Museum of Amsterdam. Lamont Moore, Assistant Secretary of the Roberts Commission, replied only three days later that the Commission had no objection to the granting of the application.[15] A license to import eleven paintings from France, including works by Degas and Renoir, was requested by Gondrand Transport for the account of a Denise Courtial on April 3, 1946, and the request was approved by Lamont Moore in a letter

FIGURE 1. MARC CHAGALL. *Nez et Echelle (Nose and Ladder)*, gouache, c.1926–7.

dated June 11, 1946.[16] On May 20, 1946 the Roberts Commission recommended that a painting by Van Gogh be released to the importer, Pieter De Boer of Amsterdam. De Boer was known to have remained open for business in Amsterdam throughout the war, and the provenance of the painting as listed on the FFC 168 states only that "someone in Holland" owned it from January 1938 until 1946.[17] An application for the release of 38 paintings from Holland, with a listed value of 80,000 guilders, was denied, and a request was made for "more details concerning the movements and ownership of the paintings both prior to March 12, 1938 and even more important, after that date, until the time of their purchase by the present owner."[18] A letter

[13] National Archives, College Park, MD. (ANACP), Record Group (ARG) 239, box 7, Interview with Customs Officials and J.A. Gilmore, April 24, 1945 [hereinafter Gilmore Memorandum].

[14] Gilmore Memorandum.

[15] NACP, RG 239, box 16. Letter to Huntington Cairns, Secretary, American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas from F.B. Laughlin, Assistant Collector, Bureau of Customs, New York, April 22, 1946. A brief search on the Getty Provenance Index did not yield any information about the Chagall paintings listed. It is possible that the titles given in the letter have been revised by scholars, or that the Museum never accessioned them. Further research in a catalogue raisonné is called for.

[16] NACP, RG 239, box 16. Lamont Moore to F.B. Laughlin, Bureau of Customs, N.Y. No list of the individual paintings is given.

[17] NACP, RG 239, box 16. Letter to Huntington Cairns, Secretary, American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas from E.W. O'Flaherty, FFC, May 14, 1946,

from the Foreign Funds Control files dated June 27, 1946 indicates that this import transaction was still being investigated, but that the Roberts Commission was about to go out of existence and the request for more information was ignored: the works entered the U.S.

In 1945 and again in 1947, the Roberts Commission sent an official request to museums, art and antiques dealers and auction houses stating that there were numerous reports of art objects being offered for sale and requested that the Commission be informed of all such offers with as much specific information as possible. It was clearly stated in this letter that: "[it] is, of course, obvious that no clear title can be passed on objects that have been looted from public or private collections abroad.[19]

A number of art objects simply slipped through Customs without inquiry. The list of works of looted art recovered in the U.S. between 1949 and 1960 compiled by Ardelia Hall of the State Department includes sixty–one cases, often with multiple works of art in a claim.[20] A case in point is the 14th-century manuscript of Petrarch's *De Africa* from the Trieste Library. Valued in 1947 at $5,000, the manuscript was acquired by an American serviceman stationed in Naples for two cartons of cigarettes and the equivalent of $60.[21] The manuscript was released by Customs in Boston on April 1, 1945, without a license from the Roberts Commission. The possessor's lawyer argued that since Customs had failed to comply with T.D. 51072, it was not applicable. The manuscript was turned over to U.S. Customs for return to Italy, but only after considerable pressure had been exerted on the possessor.

The Roberts Commission ceased operations in 1946 without identifying a single work of art as looted out of the 124 requests for determination under T.D. 51072.[22] Their failure to identify looted works may have been partially due to the limitations of their mandate, which included only art shipped from Germany or art looted from countries occupied by the Axis powers.[23] Moreover, artworks that had been forcibly sold at auction beginning in 1933, many of which had been in Jewish collections, may have come via any of the neutral countries, through Great Britain, or through South America and thus would not have been subject to T.D. 51072. In nine of the thirteen applications considered up until May 1945, the shipments originated in Latin America and Lisbon. Shipments from the British Empire were not included.[24]

The 1945 list does, however, contain two applications that should have sent up flares. One application concerns a shipment from Mexico of four cases of paintings from the well known art dealer Paula de Koenigsberg addressed to herself at an address in Uruguay, but routed through the United States. Another shipment of four cases of antiquities on the same list was sent by the Galerie Fischer in Lucerne, Switzerland, which was known to have dealt with the Nazis, to the Leopold Blumka Gallery in New York. But neither of these shipments was investigated.

"Another shipment . . . was sent by the Galerie Fischer in Lucerne, Switzerland, which was known to have dealt with the Nazis . . . But neither of these shipments was investigated."

A memorandum of a conversation with Customs officials in New York, dated April 24, 1945, succinctly expresses the shortcomings of T.D. 51072: "[T]he Customs authority have little control over goods brought in by members of the armed forces, and objects coming from Great Britain or any of her Dominions or colonies are specifically excluded from the provisions of T.D. 51072. . . it is clear that no full picture of the European Western Hemisphere transactions can be obtained from objects screened under T.D. 51072 alone."[25]

Anticipating its demise, the

18 Charles Seymour, Secretary (for Mr. Cairns) to E.W. O'Flaherty, FFC, Jan. 31, 1946.

19 NACP, RG 260, OMGUS, Box 262; *See also* Return of Looted Objects of Art to Countries of Origin, *Department of State Bulletin*, Feb 23, 1947, Appendix B at 359.

20 NACP, RG 59, Lot 62 D–4, Box 1.

21 NACP, RG 59, box 1, Letter from The U.S. Customs Service to the Collector of Customs, New York, N.Y. dated July 1, 1947; NACP, RG 59, box 24; *see also* "U.S. Now Holds 17 Cases of Art GIs Brought In," *New York Herald Tribune*, Feb. 13, 1947.

22 This was done effective June 30, 1946, despite the recommendation of Ardelia Hall and Ralph Stimson and others in the State Department that some import controls be maintained in order to prevent looted art from entering the stream of commerce in the United States. NACP, RG59, box 1.

23 NACP, RG 239, box 15. Analysis of the Specific Functions of the Roberts Commission re the Problem of Looted Works of Art, unsigned.

24 NACP, RG 239, box 7. One shipment is listed as originating in London. How much of the looted art remained in South America or the Caribbean is unknown. *See* Bill Hinchberger, "Brazil Uncovers Nazi War Loot," *ARTnews*, Sept. 1998 at 67; Martin Bailey, "Castro's Dutch Surprise," *The Art Newspaper*, Dec. 2001, p. 12.

25 NACP, RG 239, box 7. Interview with Customs Officials and J.A. Gilmore, April 24, 1945, unsigned.

Roberts Commission recommended that T.D. 51072 be rescinded. Perhaps closest to the mark in the decision to rescind T.D. 51072 is the sentiment expressed in a letter from Francis Taylor, Director of the Metropolitan Museum of Art and a member of the Roberts Commission, to the Vice Chairman of the Commission:

> I feel very strongly that the principal effect which we tried to accomplish has been accomplished and that the continuation of these controls will lead to frustration and enmity on the part of the trade which will result in disadvantage to all the institutions involved. It seems to me that when the Commission expires in June, the controls which the Commission established should expire with it. I am sure you will see the wisdom of this.[26]

In retrospect, the limitation of T.D. 51072 to European nations occupied by the Axis, and its premature repeal on June 30, 1946, just two years after its enactment, may have opened the gates of the United States to a flood of art looted during the Holocaust.

ARTWORKS THAT GOT THROUGH

Two landmark cases in the history of the recovery of art looted during World War II illustrate two aspects of the problem of looted art and its restitution. *Menzel v. List*[27] involved a painting by Marc Chagall purchased by the Menzels in 1932 (Fig. 1) and confiscated by the Nazis in 1941 after the Germans invaded Belgium. Mrs. Menzel located the painting only in 1962 in the possession of Albert List in New York, admittedly a good faith purchaser. Mrs. Menzel succeeded in getting her painting back, but only after complicated litigation.[28]

FIGURE 2. ALBRECHT DÜRER: *Portraits of Hans Tücher* and *Felicitas Tücher.* Looted in 1945. Returned to Weimar in 1982.

Kunstsammlungen Zu Weimar v. Elicofon, a case decided by a federal trial court in New York in 1981, and later affirmed on appeal, is a good reminder that the looting of art was widespread *after* the war as well, and that American troops did their share of looting, thus providing yet another source of entry into the U.S..[29]

The Weimar case involved two extraordinary 15th-century portraits by Albrecht Dürer from the collections of the Weimar Museum in eastern Germany (Fig. 2). The paintings had been ripped from a triptych stored in the Schwarzburg Castle, where they had been moved for safekeeping during World War II. After occupation of the castle by American troops, the paintings were gone. Documents in the National Archives indicate that these two paintings were among thirteen important paintings stolen from Schwarzburg Castle and reported missing to the American occupation forces in October 1945. An investigation was conducted at the time, but no trace of the thirteen paintings was found.[30]

The Dürer paintings were discovered some twenty years later in the possession of a New York attorney, Edward I. Elicofon, who had purchased them in 1946 for $450 from an American serviceman who showed up at Mr. Elicofon's home with *at least eight paintings under his arm,* claiming that he had bought the paintings in Germany. The discovery of the identity of the paintings was fortuitous—a friend of Mr. Elicofon's saw them in

[26] *See* "Return of Looted Objects of Art to Countries of Origin," *Department of State Bulletin,* Feb 23, 1947, pp. 358–59.

[27] 267 N.Y.S.2D 804 (Sup. Ct. 1966).

[28] *See* Lawrence M. Kaye, "Looted Art: What Can and Should be Done," 20 *CARDOZO Law Review* 657, 660 (1998).

[29] *Id.* at 663–64; 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd,* 678 F.2d 1150 (2d Cir. 1982).

[30] NACP, RG 260, "Economic," Box 46.

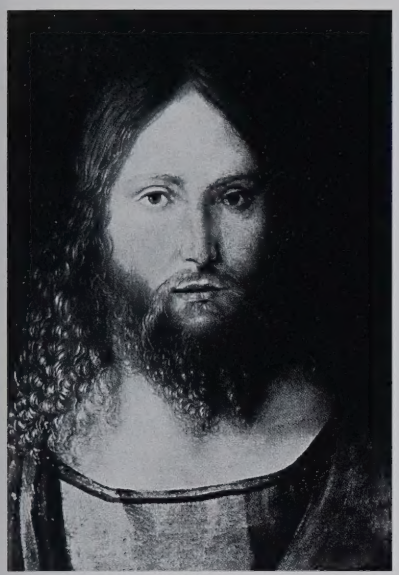


FIGURE 3. JACOPO DE'BARBARI. *Bust of Christ*, c.1503. Looted in 1945. Returned to Weimar in 2000.

his house and remembered having seen them in a book on artworks missing from German Museums after WW II. The resolution of the case involved issues of U.S. and German law and U.S. Military Government law; as a result, the parties had to engage in many years of legal proceedings before the courts finally ruled in favor of the plaintiff, the Weimar Museum.

Another item on the list of Weimar paintings stolen from Schwarzburg Castle was discovered in November 1999, in the possession of a furniture restorer on Long Island. He said he was removing black paint from a piece of wood in his shop and discovered the painting underneath. The *Head of Christ* by Jacopo dé Barbari (Fig. 3), painted in 1503 and valued at more than $4 million, was seized by U.S. Customs when he tried to "ransom" the work to the Weimar Museum. It was returned to the Weimar Museum in a ceremony in New York on December 5, 2000.[31] In all, thirteen paintings were reported to the U.S. authorities in 1945 as stolen from the Schwarzburg Castle.[34] All but four are still missing.[33]

THE UNITED STATES POST OFFICE

Yet another route for the entry of looted art into the U.S. was the Postal Service, both civilian and military. If unauthorized goods were shipped out of Germany, they should have been stopped upon entry into the United States. The United States Post Office was authorized to investigate all foreign mail parcels. U.S. armed forces personnel stationed outside the continental United States were entitled to free entry of gift parcels of an aggregate value of $50 when accompanied by the required declaration. The postal authorities were authorized to inspect parcels that were not accompanied by a proper declaration, or where the appearance of the parcel indicated it might be valued at more than $50.[34] Any parcel that was not accompanied by a declaration, or was deemed to be in excess of the allowed value was subject to seizure and forfeiture.[35] However, "any forfeiture so incurred" could be "mitigated to an amount equal to 10% of the duty (actual or potential), provided there is no evidence indicating to the collector that failure to label or indorse [sic] the package was not due to willful negligence or an intent to defraud the revenue."[36]

"There is ample evidence that the Post Office procedures were no more effective than the military laws. The most famous case in point is the matter of the Quedlinburg Treasures . . ."

Although the Roberts Commission received from Foreign Funds Control most of the postal censorship intercepts relating to works of art, there does not seem to be any evidence that they acted on the information received.[37] There is ample evidence that the Post Office procedures were no more effective than the military laws. The most famous case in point is the matter of the Quedlinburg Treasures, stolen from a mine in Germany by Joe Tom Meador and mailed home to Whitewright, Texas in 1945. The objects included medieval illuminated bibles with jewel–encrusted covers, carved crystal jewels, a gold reliquary and an ivory comb said to have belonged to the Ottoman King Henry I. According to all the reports, Meador simply packed up these precious objects and mailed them home, with instructions to his family not to show them to anyone. Although the subject of years long investigation, the objects did not surface until after

"IN 1944 THE ALIEN PROPERTY CUSTODIAN VESTED SOME 400 WORKS OF ART HELD BY THE BUCHHOLTZ GALLERY ON EAST 57TH STREET IN NEW YORK CITY. . . . AS WAS THE CUSTOM . . ., THESE WORKS WERE THEREAFTER SOLD AT AUCTION."

31 See Benjamin Weiser, "Restorer Who Found a 16th Century Painting is Charged," *New York Times*, Nov. 10, 1999, p. B5; Melissa Gronlund, "Taking a Bite Out of Art Crime," *ARTnews*, Feb. 2001, p.64; *IFAR Journal*, Vol. 4, no. 2, p. 8.

32 NACP, RG 260, Economic, Box 46.

33 For illustrations of two of the still missing works, see *IFAR Journal*, Vol. 4, no. 2, p. 8.

34 Customs Regulations of 1937, 19 U.S.C.§§66, 618 (P.L. 790); Treasury Decisions Under Customs and other Laws, vol. 74, July 1938—June 1939, T.D. 49755, 283–84.

35 T.D. 49755, Art. 371 (c).

36 T.D. 49755, Art. 371 (c)

37 NACP, RG 239, box 15. J.A. Gilmore, Confidential Memorandum for the Files, Conference with Foreign Funds Control officials re Investigative Work on Possible Instances of Dealing in Looted Property as Reported by the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, February 24, 1945.

MEASURES INTENDED TO PREVENT ENTRY OF LOOTED ART INTO THE U.S.	LOOPHOLES/WEAKNESSES OF THESE MEASURES
U.S. CUSTOMS:	U.S. CUSTOMS:
Treasury Decision (T.D.) 51072 enacted July 1944; repealed June 1946 Required imported art objects to be licensed or authorized by U.S. Treasury	• Uneven enforcement • Exempted imports from United Kingdom, British Colonies, and neutral states • Control depended on individual inspectors • Questionnaire (FFC-168) insufficiently detailed
U.S. POSTAL SERVICE	U.S. POSTAL SERVICE
Authorized to inspect parcels not accompanied by a proper declaration or valued above $50	• Insufficient staff; weak enforcement
MILITARY GOVERNMENT LAWS (MGL)	MILITARY GOVERNMENT LAWS (MGL)
MGL 59—Imposed duty to report looted property MGL 52—Blocked and controlled artwork MGL 53—Foreign Exchange Control prohibited removal of property from Germany	MGL 52 amended 1946 to affect only objects valued above 10,000 Reichmarks Forced those who legitimately owned artworks, including some Jewish artists and their heirs, to leave their art in Germany
	OTHER AVENUES OF U.S. ENTRY
	Freezing, vesting, and subsequent auctioning of property confiscated by the U.S. Alien Property Custodian

Meador's death in 1980, when his relatives began selling off the treasure piece by piece.[38]

In defense of the Mail Division authorities, however, it should be noted that the Deputy Collector of the Mail Division of the General Post Office emphasized in a report to the Collector of Customs, dated September 25, 1944, how understaffed his division was and stated: "It is obvious that the present force will be insufficient to cover the normal peacetime activities."[39]

THE ALIEN PROPERTY CUSTODIAN

Under the provisions of the Trading With the Enemy Act, originally enacted during World War I, the Alien Property Custodian, acting under Presidential authority, could seize and confiscate the property of an enemy or the ally of an enemy located within the United States.[40] Stringent controls instituted during World War II provided for the "freezing" of foreign funds and the institution of "vesting," which gave the government extraordinary powers to confiscate the property of those whom it considered enemy aliens.[41] The Executive Orders authorizing "freezing" and "vesting" provided:

> During the time of war or in a period of national emergency any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms directed by the President...and...such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States.[42]

In 1944 the Alien Property Custodian vested some 400 works of art held by the Buchholz Gallery on East 57th Street in New York City, including works by Max Beckmann, Paul Klee, Kathe Kollwitz and Marc Chagall.[43] As was the custom of the Alien Property Custodian, these works were thereafter sold at auction. Karl Buchholz, a German art dealer, was among the dealers appointed by the Nazi Commission for the Exploitation of Degenerate Art to market the so-called "degenerate" art confiscated

[38] *See* "Case Study: The Quedlinburg Church Treasures," *The Spoils of War*, 148–58. The Church of St. Servatius in Quedlinburg, home of the objects since the 10th century, managed to get most of them back, but only after paying the thief's family a ransom of almost $3 million. The theft was reported to the U.S. Military authorities when it was discovered; NACP, RG 260, AG 1948, Box 344.

[39] J.F. Eguiguren, Deputy Collector, Mail Division, General Post Office, to G.W. O'Keefe, Assistant Collector, Custom House, New York, September 25, 1944.

[40] 40 Stat. 411 (1917), 50 U.S.C. App.§§ 1–31 (1940); see generally *Plunder and Restitution*, pp. SR-58-SR-72.

[41] Executive Order 8389, 3 CFR 645 (1943); The First War Powers Act, Executive Order, 3 CFR 1174 (1943).

[42] 50 U.S.C. (App.)§5(b).

[43] *Federal Register*, Saturday, September 16, 1944, Vesting Order 37111; Saturday, November 1, 1944, Vesting Order 4285. The gallery was actually owned by Kurt Valentin, a German art dealer and protégé of Karl Buchholz.

by the Nazis.[44] Among the Buchholz Gallery's clients were major American collectors and museums.[45]

MILITARY GOVERNMENT LAWS

The Office of the Military Government for Germany, United States (OMGUS) was responsible for the governance of the U.S. occupied zone of German. Acutely aware of the pillage that had taken place, they acted swiftly to effect restitution of looted property. Military Government Law (MGL) 59, provided for "Restitution of Identifiable Property." Article 1(1) defined the intent "to effect to the largest extent possible the speedy restitution of identifiable property... to persons who were wrongfully deprived of such property between January 30, 1933 and May 8, 1945 because of their race, religion, nationality, ideology or political opposition to the National Socialism."[46] Property was deemed confiscated if the transfer was made *contra bonos mores*, under threats or duress, or any other unlawful taking, or due to measures taken by the NSDAP or any of its affiliated organizations.[47]

The restitution of movable personal property presented a particularly difficult issue, because the number of transfers can be unrecorded and can take place more rapidly. Article 19 recognized this difficulty by excepting certain tangible personal property from restitution, but specifically stated that "religious objects or . . . property which has been acquired from private ownership if such property is an object of unusual artistic, scientific, or sentimental personal value, or was acquired *at an auction, or at a private sale in an establishment engaged to a considerable extent in the business of disposing of confiscated property,*" was subject to restitution.[48] (Emphasis added) Moreover, under article 73 of MGL No. 59, there was an affirmative duty to report looted property imposed on "anyone who has, or has had in his possession, at any time after it was transferred by or taken from a persecuted person, any property which he knows or should know under the circumstances" was confiscated property.[49]

MILITARY GOVERNMENT LAW 52

Although the laws promulgated by OMGUS were also intended to prevent the trade in looted art, they were largely unsuccessful. MGL 52, Blocking and Control of Property, promulgated in 1944 provided that "no person shall import, acquire or receive, deal in, sell, lease, transfer, export, hypothecate or otherwise dispose of, destroy or surrender possession, custody or control of any property:...[w]hich is a work of art or cultural material of value or importance, regardless of the ownership or control thereof."[50] Under pressure from German art dealers and museum professionals, this law was revised in 1946 to allow commerce in art objects valued at 10,000 Reichmarks or less and required anyone who dealt in art objects valued at more than 10, 000 RM to apply to OMGUS for a license to trade in or export such works and to provide an inventory of all such artworks in their possession.[51]

MGL 53, Foreign Exchange Control, enacted in 1946, prohibited "[t]he exporting, remitting, or other removal of any property from Germany."[52] Although primarily directed at control of financial assets, the law included under the definition of "property" "works of art and other cultural materials."[53]

Despite these measures, there were numerous transgressions. In a memorandum dated March 6, 1947 to the Director of OMGUS, the Chief of the MFA&A Section wrote:

> The OMGUS base of RM 10,000 has the effect of encouraging black transactions, which are obviously not reported at all, of establishing "Macy" prices at just under the reporting limit, in which it appears probable that extra considerations are involved. Here again the effect has been that the dealers establish price levels at just below the reporting limit, and it is suspected that differentials are adjusted in some other way than by exchange of currency. The dealers are plainly most reluctant to report sales and purchases; whether the reluctance arises from intent to evade payment of taxes, indicate substantial trade in cultural objects known by the dealers to be of questionable origin, or simply reflects an abnormally secretive nature characteristic of this

"ALTHOUGH THE LAWS PROMULGATED BY OMGUS WERE ALSO INTENDED TO PREVENT THE TRADE IN LOOTED ART, THEY WERE LARGELY UNSUCCESSFUL."

[44] *The Rape of Europa*, pp. 23–24.

[45] *Ibid*, p. 4.

[46] OMGUS, Property Control, November 1948, MGL 59, art. 1, p. 53.

[47] *Id.*, p. 53.

[48] MGL No. 59, art. 19, p. 54.

[49] MGL No. 59, Part XIII, art. 73.

[50] MGL No. 52. Amended, Blocking and Control of Property, Art. II Prohibited Transactions.

[51] NACP, RG 59, Lot File 62D–4, Entry 3104A, box 24, OMGUS, Public Relations Office, APO 742, Berlin, Germany, December 10, 1946.

[52] MGL No. 53, Foreign Exchange Control, Art. I, Prohibited Transactions, §2(d).

[53] *Id.*, Art. VII, §11(c).

> somewhat shady trade group is not yet determined... To date not a single report of a transaction exceeding RM 10,000 has reached this office, although there is reason to believe that deals involving many times this sum have taken place.[54]

Despite the U.S. Customs laws controlling the import of artworks and the export restrictions enacted by OMGUS, the flow of looted art between 1933 and 1952, and even thereafter, continued.

The international agreements and postwar laws and policies of the U.S. and its Allies have been justifiably lauded for their success in the face of enormous obstacles. But despite enactment of many laws, from T.D. 51072 by U.S. Customs to Military Government Laws 52, 53 and 59, it is clear that looted art entered the U.S. during and after the war. The laws were limited in scope and direction and unevenly enforced. We do not know how much art entered this country. But the fact that it entered at all means we still need to be vigilant in researching provenance and restituting works to their rightful owners.

The Principles on Nazi-Confiscated Art, released on December 3, 1998 in connection with the Washington Conference on Holocaust-Era Assets, have been accepted internationally. They urged:

- that artworks with gaps in provenance should be identified;
- that a central registry of information about looted artworks should be established; and
- that national processes to resolve ownership issues should be implemented.

The extensive efforts by U.S. museums to document and circulate provenance information is also to be commended. Both the American Association of Museums and the Association of Art Museum Directors have been forthcoming in issuing guidelines and in seeking to streamline the provenance information generated by their member institutions.[55] These are all steps in the right direction. But there is still much work to be done.

[54] NACP, RG 59, Lot 62-D-4, Box 28, Memorandum from Theodore A. Heinrich, MFA&A to Director, OMGUS, March 6, 1947.

[55] *See, e.g.,* Nancy H. Yeide, et al., *The AAM Guide to Provenance Research* (2001).

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THE DEBATE OVER CLEANING PAINTINGS:

HOW MUCH IS TOO MUCH?

JOYCE HILL STONER*

FIGURE 1. Beware of home remedies! Fantastik™ spray cleaner leached and blanched the upper left of this early view of Jefferson's capitol building in Richmond, Virginia. Photo: J. H. Stoner.

In today's world of professional paintings conservation, we adhere to the ethic that everything we do must be "reversible." In other words, anything we add to a work of art should be safely removable in the future without causing harm to the original artist's materials. Therefore, we keep a close eye on unusual materials employed by artists that may prohibit traditional treatment techniques (e.g., if artists use wax or other heat-reactive substances in their paint mixtures, we may not be able to use adhesives that require a heated spatula or vacuum heat table to set down flaking). Cleaning a painting, however, is probably the least reversible activity a paintings conservator is regularly called upon to do. Sadly it is also the most visible and most discussed activity and the one most commonly practiced by amateurs. At the Winterthur/University of Delaware Program in Art Conservation, we offer a free, monthly consultation "clinic" for the condition of paintings and other works of art. We often see gruesome examples of "home treatment": "Ajax" used in an attempt to remove grime (and with the grime, alas, came away many of the

"Cleaning controversies have been with us since at least the 15th century. Sheldon Keck, pioneer 20th-century conservator, traced complaints about the cleaning of paintings even back to antiquity."

*Joyce Hill Stoner, Ph.D., is Professor and Paintings Conservator, Winterthur/University of Delaware Program in Art Conservation. She is also a member of IFAR's Art Advisory Council. Since 1976, she has coordinated the oral history project for the Foundation for the American Institute for Conservation. See footnote 13 for list of interviewees consulted for this article.

autumn colors of a landscape) or "Fantastik" spray cleaner used by an architecture student to clean an important early view of Thomas Jefferson's capitol building in Richmond (Fig. 1), leaching and blanching the blue of the sky in the upper left.

Cleaning controversies have been with us since at least the 15th century. Sheldon Keck, pioneer 20th-century conservator, traced complaints about the cleaning of paintings even back to antiquity. Pliny the Elder wrote that a painting by Aristiedes of Thebes representing a scene from a Greek tragedy was "ruined through the ignorance of the painter to whom Marcus Junius as Praetor entrusted it to be cleaned before the Games of Apollo." Accusations such as "ruined" or "flayed" have been recorded by writers through the 15th, 16th, and 17th centuries. Toward the end of the 17th century, a theory emerged and continued to gain currency through the 18th, that "Time" improved and mellowed paintings, increasing their beauty, harmony, subtlety, and mystery (Fig. 2). Sir George Beaumont, a British artist who died in 1827 noted, "A good painting, like a good violin, should be brown." [1]

The English public became intensely involved with picture cleaning controversies at the National Gallery, London between 1846 and 1853 and again between 1947 and 1950. One reason for the first shrill exchange of letters in the press was a "gallery varnish" of mastic resin and linseed oil that had been periodically applied to the paintings at the National Gallery in the first half of the 19th century, causing an overall browning. When Charles Eastlake, the Keeper, had this "museum gravy" removed, revealing more of the actual colors of beloved paintings by Rubens and Titian, a committee was appointed by the House of Commons to investigate outraged complaints of "scouring" or "scraping." After World War II, some of the paintings that had been cleaned during or before the war years (when most of the collection had been safely stored in Wales or Gloucestershire) were put on display intermixed with paintings with old, discolored varnishes, and new outcries were heard about "drastic cleaning" and "serious damage" to works by Rembrandt and Velasquez. In both centuries investigations were launched and reports issued by committees of experts noting that, in their view, the paintings had not been damaged. Observers had been taken aback by the contrasts. However, there are more sophisticated controversies with regard to degree of cleaning that I shall discuss later.

In 1986, Norman Brommelle, former Executive Director of the International Institute for Conservation, noted that the British cleaning controversy in the 1950s:

> gripped the entire country—everybody talked about it. People talked about it in pubs, reading the latest letters in the *Times*. The Guinness brewery ads had a laughing cavalier—one side of his face was brown with dark varnish on it, and his mouth was drooping, and the other side was clean and his mouth was smiling. The unvarnished, cleaned part was what happens when you drink Guinness.[2]

FIGURE 2. Booklet cover, "Cleaned Pictures" exhibition, National Gallery, London, 1947 showing Hogarth etching "Time Smoking a Picture."

Why would the proverbial "man on the street" become engaged in such a discourse? Works of art have a profound power to symbolize our culture and our beliefs, and we may become outraged if we feel they are threatened. In the movie "The Train," Burt Lancaster, as a French train conductor, willingly risks his life to transport crates of French paintings out of Nazi Germany. The awareness of this power also underlay the March 2001 destruction of two giant fifth–century statues of Buddha in Afghanistan by the then–ruling Taliban.

Perhaps we first fell in love with a painting when it was covered with discolored varnish. We are then angered if its appearance is altered when the browned or blackened coating is

[1] Sheldon Keck, "Some Picture Cleaning Controversies: Past and Present," *Journal of the American Institute for Conservation* 23, No. 2, (1984) pp. 73–87.

[2] Norman Brommelle, oral history interview by Joyce Hill Stoner, 18 November 1986. We have been trying to trace this Guinness advertisement and have been unsuccessful to date. Oral histories may serve as records for cherished legends and beliefs along with verifiable facts.

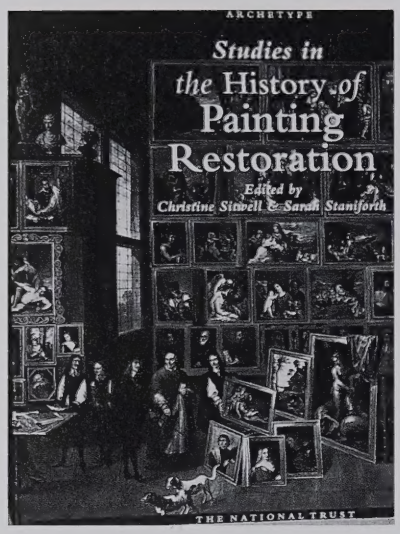

FIGURE 3. Proceedings, landmark conservation conference, National Gallery, London, February 1996.

removed. Delacroix copied paintings by Rubens when they were covered with discolored varnish, not realizing that his perception of his idol's palette was "smoked by Time." The "Night Watch" by Rembrandt was not actually a night scene but temporarily coated with brown varnish when the nickname was attached. The art directors of the movie "The Agony and the Ecstasy" laughably showed Charlton Heston as Michelangelo applying the puzzle pieces of the "giornate" of the Sistine Chapel ceiling in their candle smoke-damaged, browned glue-coated early 20th-century incarnation.

Until the French Impressionists, nearly all oil paintings were varnished, and all varnishes prior to the 1930s turned yellow and then brown. Artists generally knew this, replaced varnishes periodically or instructed their restorers to remove and replace varnishes so they would appear rich, saturating, and water clear. Charles Leslie complained that his first history picture was not allowed in the British Institution's exhibition of 1814 on the grounds that it was not varnished and therefore looked "unfinished." Charles Willson Peale and Thomas Sully wrote instructions about removing old varnishes from their works and the works by others.[3] James McNeill Whistler wrote to his restorer Stephen Richards asking him to replace the varnish on the portrait of Cecily Alexander only four years after it was painted.[4] Knowledge of materials, including grinding the right percentage of pigment with oil or preparing and applying varnishes, was part of most artists' training until the 19th century when the separate profession of restorer/conservator became more widespread.[5] (Fig. 3) However, artists were also aware that some "connoisseurs" preferred an "Old Master" violin-varnish tone. Upon hearing of a prospective buyer for one of his landscapes, Constable asked: "Had I not better grime it down with slime and soot, as he is a connoisseur, and perhaps prefers filth and dirt to freshness and beauty?"[6]

"Deciding not to clean a painting should always be an option. . . . An oil painting covered with discolored varnish is not in jeopardy. It is not 'unhealthy'."

Sophisticated studies now tell us how complicated the process of "seeing" actually is, and how it is complicated by age, eyesight, era, contrast, and lighting. Museum conservators and lighting designers lament the fact that safe, low, light levels are particularly unacceptable to the elderly eyes of the most powerful trustees. Art historian Ernst Gombrich believed that our popular visual culture jaded our ability to appreciate subtler ambiguities:

> The brighter palette, the strong and even loud colors to which first Impressionism and then twentieth–century paintings (not to mention posters and neon light) have inured us may have made it difficult for us to accept the quiet tonal gradations of earlier styles.[7]

An important factor, of course, is contrast. The curators and conservators of the Getty Museum have made a point not to hang recently cleaned paintings next to those needing varnish removal as the contrast may be jarring. They may schedule the timing for the removal of varnishes according to the proposed hanging scheme, to avoid the sort of glaring contrast that was part of the cause of the National Gallery, London controversy following World War II. Light level and wall color may also have significant effects. Curator Dr. Christian Wolters noted that during the rebuilding of the Alte Pinakothek in Munich, he installed dark wall coverings and "the paintings immediately appeared brighter, and I was asked whether I had cleaned them."[8] Steven Weintraub of Art Preservation Services of New York City has discussed changing the color

[3] K. Swerda, "In Their Own Words: Painting Conservation and Restoration in Nineteenth–Century America according to the artists and restorers who recorded their practices and beliefs," *ICOM Committee for Conservation, 13th Triennial Meeting*, Rio de Janeiro, September 2002, 198–202.

[4] Joyce Hill Stoner, "Whistler's Views on the Restoration and Display of His Paintings," *Studies in Conservation* 42, No. 2. (1997) 107–14.

[5] An impressive scholarly conference was held at the National Gallery, London in February 1996. The ten papers on professional conservation activities from the Renaissance to the 19th century were published in 1998 by the National Trust and Archetype Publications.

[6] E. H. Gombrich, *Art and Illusion*, Pantheon Books, New York, 1960, p. 53.

[7] Gombrich, pp. 53–54.

[8] Christian Wolbers interview by Michael von der Goltz, 6 January 1998.

temperature of lights and has told our students that he has "cleaned Vermeers" by changing the Kelvin readings of the lighting. The Kimbell Museum in Ft. Worth, Texas, has what Weintraub feels is the optimum lighting for paintings—a midpoint between golden tungsten lighting and bluish daylight.

I would like to put on the record that deciding *not* to clean a painting should always be an option. Reconsidering the lighting and the wall coloring should be the first order of business. The long-term preservation of a textile stained with perspiration is in jeopardy—it should be cleaned soon and safely if it is to be considered "healthy." An oil painting covered with discolored varnish is not in jeopardy. It is not "unhealthy." The decision to remove a discolored varnish from a painting is entirely a cosmetic decision. Safe cleaning may not be physically possible with the techniques known to a given decade; therefore, waiting may be the best course of action. Waiting is "reversible."

Some paintings were not intended by the artist to be varnished. Pissarro actually lettered instructions on the back of his *Paysage à Chaponval* of 1888, translated to read, "please do not varnish this picture." Impressionist works that are still unvarnished, Andrew Wyeth tempera paintings on panel, Edouard Vuillard's distemper works on canvas, or color field acrylic paintings may all need to have grime or tobacco smoke carefully disengaged from the surfaces. This type of cleaning is another class of procedure but is still rarely a preservation concern. If dirt removal cannot be done safely with current methods, it may be advisable to wait. Any of the above works might have been given an unwarranted coat of varnish, making the surface distractingly shiny or discolored, in which case, the varnish should probably be removed if a method can be found that is safe in contact with delicate surfaces.

FIG. 4A. Washington Allston (1779-1843), *Taming of the Shrew*, 1809, oil on canvas, 27¾" x 30⅞" Philadelphia Museum of Art. Purchased with the Edith H. Bell Fund and the J. Stogdell Stokes Fund. Known as the "American Titian," Allston used multiple layers of glazes.

FIG. 4A.

FIG. 4B. *Taming of the Shrew*, cross section of a pin-head-sized sample from Katherine's red bodice (taken during the treatment of the painting in 1988) shown in normal light. It shows that the red paint has bled upwards into the first layer of varnish applied.

FIG. 4B.

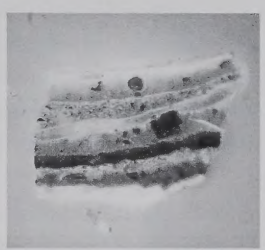

FIG. 4C. The same cross section, illuminated by ultraviolet light, showing that the autofluorescing varnish has significantly penetrated the lower oil paint film.

FIG. 4C.

If the artist has interlayered his oil paint layers with readily soluble resin varnishes, it might be best to wait to remove an overall discolored varnish until our cleaning technology has progressed further. Washington Allston (1779–1843) was known as the "American Titian" by artists in Rome in the early 19th century. He used multiple layers of glazes with strong driers, incorporated soluble components into his paint films, and was known to apply a final toning layer that he called "Titian's Dirt." The first restorers who cleaned his paintings may have removed readily soluble glazes and the "Titian's Dirt." Allston himself in 1839, on seeing his heavily glazed *Diana in the Chase* (1805) after a lapse of twenty-four years, disclaimed authorship, saying that the "picture cleaner had totally destroyed his conception." Allston's *Taming of the Shrew* (1809, oil on canvas, Figs. 4a, b, and c) was treated by Mark Aronson in 1988 at the Philadelphia Museum of Art. A study of a cross section of red drapery taken from Katherine's bodice (Fig. 4b),[9] shown in normal light, suggested that a previous reduction of the varnish fortunately may have been carried out scrupulously with a scalpel rather than with solvents. In this particular case it is likely that the original paint surface survived intact. Figure 4b, in normal light, shows that the red paint has bled upwards into the first layer of varnish applied. Figure 4c, the same cross section but illuminated by ultra–violet light, shows that the auto-

[9] Cross section taken by Richard Wolbers, paintings conservator and Professor of Conservation Science for the Winterthur/University of Delaware program.

fluorescing varnish has significantly penetrated the lower oil paint film, creating what Richard Wolbers calls an "interactive zone" between the varnish and the paint. It would be extremely difficult, even using the newest methods, to clean this painting safely with solvents. I have seen another painting by Allston which was indeed, "scraped, scoured, and flayed" by a practitioner who did not understand the problems innate in this artist's interlayered technique. Meticulous work with a scalpel to simply reduce the uppermost varnish is probably the only dependably safe option for such a painting currently. We keep an eye on future possibilities with lasers.

TWO OPPOSING CAMPS: RUHEMANN AND HELL

If we dismiss uninformed and unsafe practices or inept household remedies, we can look at the two philosophical approaches to safe varnish removal that lie at the root of many published controversies of the twentieth century. *The Burlington Magazine* served as a forum for cleaning controversy discussions in the early 1960s. In a 1962 article, Stephen Rees Jones of the Courtauld Institute noted, "The controversy is not between those who favor cleaning and those who do not but rather over how far cleaning should proceed." There seemed generally to be two camps in *The Burlington Magazine* discussion about "how far cleaning should proceed": supporters of Helmut Ruhemann and the National Gallery, London, on one side and colleagues of Dr. Johannes Hell, a private conservator in London, on the other. (Hell's supporters included the art historian Ernst Gombrich.) Both Ruhemann and Hell were important German conservators who had worked at the Kaiser Friedrich

"There seemed generally to be two camps about 'how far cleaning should proceed': supporters of Helmut Ruhemann and the National Gallery, London on one side, and colleagues of Dr. Johannes Hell, a private conservator in London, on the other."

Museum in Berlin and came to London as Hitler rose to power in Germany. Each trained a number of important conservators in the UK, some of whom later moved to the US. Much of the genealogy of current approaches to cleaning can, in large part, be traced to these two schools of thought.

In an ideal world, I would now take all my readers with me for a field trip to look at paintings in London and New York, as Ruhemann's theories have provided the backbone for the approach to cleaning practiced at the National Gallery in London since 1934, and two former pupils of Johannes Hell have provided the vision for the approach at New York's Metropolitan Museum of Art since 1959.

Helmut Ruhemann (1891–1973) emigrated to England in 1933, with the help and advice of art historian Philip Hendy (curator at the Museum of Fine Arts, Boston, and later Director of the National Gallery in London). From 1934 until about a year before his death in 1973 Ruhemann spent most of his career as part-time lecturer for the Courtauld and consultant conservator for the National Gallery,

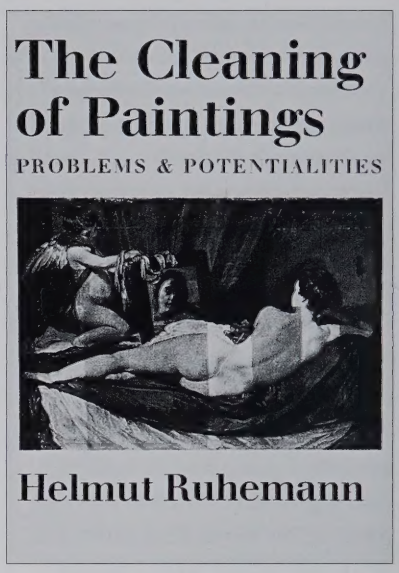

FIGURE 5. The more positivistic Ruhemann approach is partly represented by the "window" or "box cleaning" of Velasquez' *Rokeby Venus* on the cover of this 1968 Helmut Ruhemann book.

London. He retired on his 81st birthday in 1972. Norman Brommelle wrote about Ruhemann after he died in 1973:

> The important legacy of his work has several facets. There is a great corpus of restoration work of consistently high quality; there are the many years of tireless exposition of principles which are now accepted as commonplaces; there are his detailed studies of the technical methods of European painters in which he disposed of many fallacies; and there is his untiring attention to teaching.

Ruhemann has left us a rich legacy through his 1968 book, *The Cleaning of Paintings: Problems and Potentialities*, with forward by Sir Philip Hendy (Fig. 5). He has also left a legacy through his pupils; I have interviewed eleven of his pupils or working colleagues to date, including David Bomford and Martin Wyld of the

National Gallery, London; Norman Brommelle and Herbert Lank, formerly of the Hamilton-Kerr Institute in Cambridge, UK, where many outstanding young conservators have been trained; David Bull of the National Gallery, Washington, and experienced private practitioners, Lord Antrim, Bettina Jessell, Patrick Lindsay, and Robert Shepherd.

Johannes Hell's (1897–1974) legacy is somewhat harder to examine: a short article on "Rembrandt's Painting Technique" in *Kunstchronik* in 1957 and his doctoral dissertation on Rembrandt's Late Drawings (published in *Repertorium für Kunstwissenschaft* in 1930). These are publications valued highly by art historians Ernst Gombrich and Julius Held and by Hell's pupils in conservation. Julius Held, known for his art-historical publications particularly on Rubens, once trained to be a conservator at the Kaiser Friedrich Museum and considered Hell a close friend. Hell's first mentor was Adolph Goldschmidt (1863–1944) who instilled in him a love of works of art and the ability to excite the same love in his students. (Goldschmidt had wavered between a career in science and art history and was known for his connoisseurship with the key component of "critical seeing," first discussed in published form in 1893.) Hell participated in Kurt Wehlte's lectures and practical classes at the Charlottenburg State Art School and became a teacher and drawing master at the Berlin State Art School and University. He gave up painting to study art history, earning his doctorate in 1928. He next began treating paintings, working first with Helmut Ruhemann, and continuing at the Kaiser Friedrich Museum with Jacob von Danzas after Ruhemann left for England. Dr. Hell's wife Kate, who assisted him with inpainting, was Jewish, and after the Nuremberg Decrees he was told he had to divorce her or lose his position. They moved to London in 1937. An obituary of April 1975 noted:

> Apart from a period of nine months in 1940, when he was interned on the Isle of Man as an enemy alien, he worked as a free lance restorer, earning himself an international reputation by the quality of his work. He was entrusted with the restoration of the Dulwich Picture Gallery, when that historic collection was returned to South London after the war. He was a draftsman and painter of outstanding talent and technique. Satisfactory recreation of artistic masterpieces calls for a combination of intellectual humility and artistic drive. To have realized this in himself and to have passed it on was Johannes Hell's achievement.

Hell's influential pupils included: John Brealey, his first pupil, who was paintings conservator at the Metropolitan Museum from 1975 to 1989; Hubert von Sonnenburg (who was at the Metropolitan Museum from 1959 to 1974 and again from 1991 to the present); and Knut Nicolaus of Cologne. Von Sonnenburg remembers Hell as a brilliant lecturer on artists' techniques. He now carries out extensive research on artists' techniques as Hell once did. Nicolaus has described Hell's trips with his pupils to the Dulwich Gallery.[10] Praising Hell's connoisseurship, he noted, "as a great chef can talk about food and make your mouth water, when Hell talked about art your mouth would also start watering, so to say."

[10] Interview by Stephen Schaefer.

Hell and Ruhemann can be said to represent two poles of philosophy, especially evident through *The Burlington Magazine* controversy of the early 1960s. The legacy of the attitudes and approaches of these two men can still be found today, in their pupils, "grandpupils," and "great grandpupils." In the last twenty-five years I have interviewed or coordinated the interviews of twenty-two conservators and art historians who were associated with Ruhemann or Hell, or are known for a philosophical approach regarding issues of how far to clean a painting. I was delighted to learn that David Bomford, paintings conservator at the National Gallery, London, and Executive Director of the International Institute for Conservation, who studied with Ruhemann and then became a close colleague of John Brealey's, has been carrying out parallel activities in his research. Bomford is the first conservator to be awarded a Slade lectureship. He was Slade Professor at Oxford in 1996–97 and gave a lecture regarding the two views as "the metaphysical" and the "positivistic" in a series on "Art and Uncertainty."

The more positivistic or more "objective" Ruhemann approach is partly represented by the "window or box cleaning" of the *Rokeby Venus* by Velasquez seen on the cover of the Ruhemann book (Fig. 5). The cleaned stripes in the plate indicate that the varnish was removed in straight lines as a mechanical and straightforward operation. David Bull of the National Gallery, Washington, DC, has noted that during the cleaning of a painting, Ruhemann often checked the work in progress under an ultra-violet light to make sure that all traces of varnish were removed. What Bomford has called the metaphysical approach involves a cleaning approach dedicated to maintaining balance or unity rather

than aiming to remove all varnish. The Ruhemann approach does not include the aim of balancing alterations in the painting caused by aging or increased translucency of particular pigments.

An editorial in *The Burlington Magazine*, no. 707, 1962, noted, "Are there not cases when distortions caused by discoloured varnish are preferable to distortions caused by disparate ageing of the colours?" The editorial went on to note that Ruhemann and the National Gallery "did not think so." Twenty years ago at the Winterthur Museum, I examined an 18th-century painting by John Hesselius (1728–78) of a woman holding a flower with bright blue leaves. This seemed to be the phenomenon often observed in 17th-century Dutch still-life paintings—the fading of a fugitive yellow pigment causing formerly green leaves to appear a surprising and jarring blue (Fig. 6). If this painting had not been cleaned, the film of yellow varnish would have imparted a "faux green" tonality to the leaves. Would this have been preferable? This is an issue that the curator or owner should consider or discuss with the conservator before the varnish is removed.

An overall coat of varnish tends to discolor somewhat evenly and predictably overall. As mentioned above, various pigments or layering effects may provide startling shifts or distortions in local areas that change the look of a painting decades after the artist laid down his brush. Copper resinate green, the beautiful biting green often found in a Titian, may develop a brown skin as it ages. As oil paint ages, the refractive index changes and the paint becomes more translucent, often showing "pentimenti" or changes of mind in the artist's composition. Winslow Homer's painting *Milking Time*, 1875, at the Delaware Art Museum, shows a young milkmaid standing in front of a fence. Homer apparently painted the fence first and then added the young woman; her white skirt has aged, becoming more transparent, and now reveals the horizontal fence rails behind her. This would probably appall the artist.[11] Rembrandt sometimes used dark grounds. If the darks in the foreground of a landscape have become more translucent, revealing the ground below, they may appear "swallowed up" and contrast oddly with the thicker, less altered white clouds. Perhaps an overall, thinned, varnish might mute this contrast and could be said to give the effect of showing an aging beauty in more forgiving candlelight rather than the harsh light of day.

"The Ruhemann approach does not include the aim of balancing alterations in the painting caused by aging or increased translucency of particular pigments."

Before I proceed further with this discussion, I would like to present the following disclaimers: In order to try to depict the two poles, I will have to speak in generalities, which are always dangerous. I would wish the reader to know that I myself could say "yes, but—" to nearly anything I am about to state, but I have to try to start somewhere and trace a linear narrative and present polar concepts by trying to organize a cloud of data. Oral history has its drawbacks; tone and memory may be dependent on career turns in a certain decade or mood on the day of the interview. Many of the interviewees stressed that what people say or said is not necessarily what they do or did. True. But oral history transcripts or memories of a mentor at least convey approaches or intentions with their unique values and traceable influences.

It is rarely possible today for us to see paintings that have not been retreated since they left the easels of either Hell or Ruhemann (who have both been deceased for over 25 years). And even if we could, the treatments by the two conservators were subject to the limitation of the materials; what we could see now would probably be discolored or changed in a significant way that might muddle our understanding of the practitioners' original ideas. Pupils of both men emphasize that their teachers evolved in both methods and materials during the middle of the century, and that better materials for both cleaning and inpainting are now available. And of course the pupils themselves also evolved in the years following the time with their teachers. What remains and what we can discuss are approaches and intentions.

David Bull, consultant paintings conservator to the National Gallery in Washington, was a pupil of Hans Schubart but worked alongside of Ruhemann. He has noted that cleaning and inpainting must be considered together. He noted that Ruhemann was especially "thorough," thorough in cleaning, removing every bit of varnish, but then inpainting very very thoroughly and very very well. Bull worked for many years with another interviewee, Robert Shep-

[11] This effect and other changes in paint films are illustrated in Andrea Kirsh and Rustin Levenson, *Seeing Through Paintings*, Yale University Press, New Haven, 2000.

FIGURE 6. Detail of an 18th-century painting by John Hesselius (1728–78), *Portrait of Mrs. John Finney* (coll. Sewell C. Biggs Museum, Dover, Delaware). The fading of a fugitive yellow pigment caused green leaves to appear blue. Photo: Herbert L. Crossan, Jr.

herd, a private conservator in London who studied with Albert Philippot in Brussels. This moves the discussion to parallel discourses in Belgium and Italy. (There are also "Rome vs. Florence" and "Munich vs. Berlin" and many more polarities of conservation approaches and intentions, but often along the same lines as discussed in this article.) Bull and Shepherd are British conservators who worked in partnership during the Hell and Ruhemann years in London. They are very aware of philosophies of tonal unity and patina which have been extensively discussed by Cesare Brandi and Albert Philippot's son Paul, now available to us in English translations through the 1996 Getty Conservation Institute "Readings in Conservation" book, *Historical and Philosophical Issues in the Conservation of Cultural Heritage*. (Fig. 7.) Hell and his pupils were opposed to what they call "radical cleaning" and believed in maintaining harmony, unity, and relational values during the cleaning; these concepts echo through the conservation approaches in many other European countries. Bull and Shepherd agree with these concepts but may maintain them during the inpainting stage rather than the cleaning stage.

"IN ORDER TO TRY TO DEPICT THE TWO POLES, I WILL HAVE TO SPEAK IN GENERALITIES, WHICH ARE ALWAYS DANGEROUS."

Paul Philippot, Belgian art historian, administrator, and university teacher brings forward elegantly the often misunderstood concept of "patina." In his article, "La notion de patine et le nettoyage des peintures," *IRPA Bulletin, 9*, 1966 (translated into English in the Getty "Readings" book) Philippot notes there is a "skin" of sorts on the surface of an aged picture which "determines the particular luster of the surface." He feels that injudicious cleaning can sometimes remove the top of the patina "piercing this skin." He considers patina to be "the 'normal' effect that time has on mater-

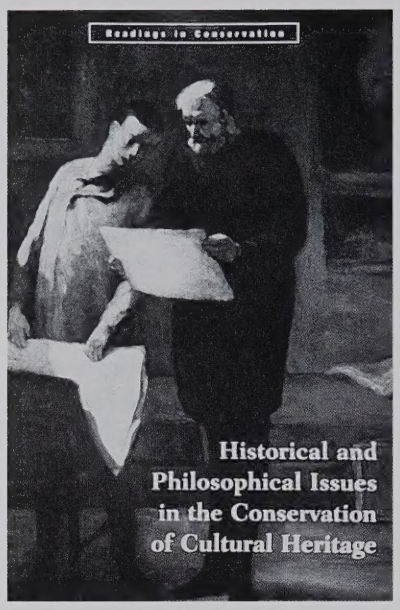

FIGURE 7. The Getty Conservation Institute's "Readings in Conservation" book, *Historical and Philosophical Issues in the Conservation of Cultural Heritage*, 1996.

ial" including the crackle pattern. He goes on to say "The conservator must also form the most precise idea possible of the *original unity of the work*." (This echoes the philosophy of Italian art historian Cesare Brandi.)

Philippot goes on to say, "Cleaning then becomes the search for an achievable equilibrium that will be most faithful to the original unity. And it is clear that the solution must be arrived at on a case-by-case basis. The cleaning of a painting can thus never be conceived of as a purely material operation and as such, 'objective'." Philippot spoke in favor of Hell and of the philosophy represented by Hell which, as mentioned above, he felt was well described by either Bomford's choice of the term "metaphysical" or the Italian term "istorico-critico" which includes historical context and the critical eye.

Ernst Gombrich noted in "Dark Varnishes: Variations on a Theme from Pliny," in *The Burlington Magazine* in 1962:

> The Shakespearean actor faced with a rhymed couplet which no longer rhymes because language changed, the musician confronted with orchestras in which a genuine harpsichord hopes to blend with violinists using modern bows, the translator of a libretto or the restorer of ancient buildings, each of them has to decide from case to case which of the necessary transpositions will do least harm to what he considers the intended tonality of the relationships.

Gombrich knew both Hell and Ruhemann and expressed confidence especially in the treatments by pupils of Hell. Gombrich said he quite liked Ruhemann, calling him "subjectively honest and well intentioned" but a "painter manqué." According to Gombrich, Ruhemann would say "I am a painter, and as a painter I can tell of every brushstroke whether it is by the master or not." He felt Hell was more factual in his art history and more modest in his approach. Gombrich wrote in his 1960 book *Art and Illusion*, "What we want [of restorers] is not to restore individual pigments to their pristine colors, but something infinitely more tricky and delicate— to preserve relationships."

Where Hell and his pupil John Brealey note the necessity of adjusting the cleaning to compensate for changes in the relationships among the pigments caused by differential aging, Herbert Lank (picture restorer in Britain from 1946 to 1994) notes:

> Most changes are quite acceptable and preferable to arbitrary fiddling about. Not all paintings are harmonious to one's own subjective taste. It is therefore not harmony but the need to maintain an atmosphere and three-dimensional illusion within the boundaries of the frame on an essentially two-dimensional surface.

Lank points out the problem that leaving on discolored varnish may be only a "short-term fix" and feels that "any restoration needing to be done again in less than say 100 years is unacceptable." Like Bull he apparently feels that if a painting is out of key, the correction should be made at the retouching stage rather than at the cleaning stage and said: "In the end, there's about three paintings a year that say, we really must do something. We must tone down the bright, because it's so out of key." Lank calls it three paintings a year that need special attention, and Brealey had told me it was about 10% of cleanings that required balancing; some observers feel that with well painted paintings in excellent condition, cleanings by Brealey or Ruhemann would have been quite similar. It is probably not the paintings in excellent condition but those that are the most damaged that show differences in approach the most keenly.

"Gombrich wrote in his 1960 book Art and Illusion, *'What we want [of restorers] is not to restore individual pigments to their pristine colors, but something infinitely more tricky and delicate—to preserve relationships'."*

Italian conservator Mario Modestini and his wife, the U.S. conservator, Dianne Dwyer Modestini, note that cleaning problems are different on dark ground paintings versus gold ground paintings. Hell and Brealey most loved Rembrandt and the Baroque whereas Ruhemann loved best the early Italian paintings. This could affect the way these conservators saw and the purity or precision of the surfaces they might most prefer or seek, just as Ernst Gombrich has written—what else we see in our world impacts on the subtleties we are able to see in works of art.

In 1985 UK conservator and scientist Gerry Hedley spoke at the Canadian Conservation Institute following his sabbatical there investigating the cleaning of paintings, and his presentation was printed informally as a spiral bound pamphlet entitled, "On Humanism, Aesthetics and the Cleaning of Paintings." In June 1990, Hedley updated his concepts with "Long Lost Relations and New Found Relativities: Issues in the Cleaning of Paintings," for the United Kingdom Institute for Conservation conference published as *Appearance, Opinion, Change: Evaluating the Look of Paintings*. Hedley seemed to have moved from a somewhat positivistic stance in 1985 to a more metaphysical stance by June 1990. Tragically, he died in a mountain climbing accident in July 1990, robbing our profession of an especially bright inquiring thinker and researcher in progress. Hedley joined Lank and Bull in saying that part of the controversy over Ruhemann's work was caused by the excellence and thoroughness of his inpainting, that he made the paintings he treated appear too finished and apparently new.

Bettina Jessell was one of Ruhemann's first pupils, working with him before and during World War II. She made a presentation at the 1976 AIC meeting about Ruhemann's exceptional skills in retouching, which was later published in the 1977 *Journal of the American Institute for Conservation*. She noted in her interview that Ruhemann generally aimed to remove all varnish and present the current condition of the work frankly, even if, as in the case of some paintings by Titian, the copper resinate had browned while other pigments had not changed at all. Mrs. Jessell noted that she feels those who aim for harmony rather than the actuality of what is there are working for the owner rather than for the artist. Owners come and go, she notes, while her loyalty is to the artist.

John Brealey, the head paintings conservator at the Metropolitan Museum of Art from 1976 to 1989, trained with Hell from 1947 to 1951. He was also a pupil of Ruhemann for a brief time. As a young man unsure about his future, he had met with both Anthony Blunt at the Courtauld and James Byam Shaw, chairman of Colnaghis; both said, "You were meant to be a restorer. And there's only one man for you to go to and that's Dr. Johannes Hell." Brealey taught students that cleaning a painting can never be objective; how many times you roll the swab over the surface changes the relationships between the colors and forms. He noted that there is an integrity to old varnish that cannot be achieved with newer coatings. He also spoke about restoring unity: "Discolored varnish lightens the darks and darkens the lights." If the whites have not changed at all but the surrounding areas have darkened, should the painting be cleaned so evenly that a white cloud or white collar rules the painting? I saw while interviewing him about his approach in 1980, that the amount of varnish he left on a painting was rarely detectable even under ultra-violet light.

"It is probably not the paintings in excellent condition but those that are the most damaged that show differences in approach most keenly."

Brealey and Ruhemann both encouraged their students to learn as much about each artist as possible before beginning a treatment. Brealey emphasized seeing as many other works by the artist in an untouched state as possible. Ruhemann emphasized the layering techniques, the painting structure, and the making of copies. David Bomford noted in his interview that Ruhemann was an objective cleaner but a subjective retoucher, whereas John Brealey, as a Hell pupil, could be considered subjective as both a cleaner and a retoucher.

How objective can cleaning be? (Fig. 8) In "Science and the Art of Picture Cleaning" in the 1962 *Burlington Magazine*, Stephen Rees Jones noted, "the first requirement is clearly to examine the actual nature of the boundary between the painting and its varnish." Let us return to the cross section of paint layers taken from the Washington Allston painting, *The Taming of the Shrew* (Figs. 4a, b, and c). Is objective cleaning possible on a painting with these interactive boundaries? Some French conservators avoid the word "nettoyage" [cleaning] and say

Use a clean sponge, cold water and Ivory Soap, and you will restore
the colors of an oil painting grown dingy by age and exposure.*

FIGURE 8. (cartoon used in many Winterthur conservators' lectures): How objective can cleaning be? Former notions of "soap and water" and other home remedies belie the true complications of removing old varnishes and grime from oil paintings.

instead "enlever" [lifting or lightening the varnish] attempting to thin or reduce the varnish overall. Paul Philippot also noted that one must proceed case by case. However, during the examination and cleaning of some paintings we may find clear boundaries that might allow us to do more objective cleanings à la Ruhemann.

An article in *Museum News* in 1989 noted that "the single most significant recent breakthrough" in the conservation of paintings was brought about by Richard Wolbers, paintings conservator and professor of conservation science for the Winterthur/UD conservation program.[12] From the 1980s to the present, Wolbers has introduced and taught new approaches to cleaning using resin soaps, gels, pH-adjusted aqueous systems, and enzymes based on his previous work in the field of biochemistry. He has been invited to conduct small workshops in more than three dozen locations internationally, introducing conservators to these alternative cleaning systems. These materials, which are also less toxic, can often permit the conservator to distinguish and selectively remove unwanted discolored layers of animal glue, linseed oil, or resins from the surface of paintings, sometimes without disturbing an underlying layer that might previously have been considered to be even more soluble using traditional solvents. Wolbers calls this "unpacking" a surface. Figures 9a and b show two stages of "unpacking" distinct films from a 19th–century landscape. Figure 9a shows partial removal of a dirt film with 1% citric acid in deionized water, adjusted to a pH of 8.0, and Figure 9b shows a fairly direct removal of a soft resin varnish in an "in-progress" stage. Traditional methods might have attempted to remove both layers at once; this would have required much stronger—and possibly hazardous—solvents. One of Wolbers's first use of enzymes to "unpack" a surface is shown in Figures 10a, b, and c, of a portrait of a woman by Jacob Eichholtz (1776–1842). This

[12] Jonathan Walters, "Tracking Advances: As Technological Advances in Conservation Occur, Conservators are Developing a New Approach to their Museum Role," *Museum News* 69, No. 1, (January–February 1989), pp. 44–45. See also Richard Wolbers, *Cleaning Painted Surfaces: Aqueous Methods*, Archetype Publications, London, 2000.

painting had what had previously been considered a not-safely-soluble overall coating of browned linseed oil. Using the en-zyme lipase, Wolbers removed the browned film, leaving intact the original soft resin varnish from the first half of the 19th century—this would not have been previously possible, except with the earlier mentioned dexterous use of a scalpel. Figure 10c shows an unretouched detail of the face after removal of the browned oil—the wisps of hair and eyelashes are intact under an original still-clear natural resin varnish, like a fly in amber—a rare sight to see. (Eyelashes and hair are often the first areas to be eroded in a non–judicious cleaning.) In this case, Philippot's patina or "skin" of the surface of the painting is truly preserved.

CONCLUSION

The two opposing viewpoints of *The Burlington Magazine* discussions in the 1960s used the same American road sign quote, "Death is so permanent," for opposite purposes. Gombrich quoted it to say how irreversible cleaning is. Ruhemann wrote in his book, "Precisely because 'Death is so permanent' and indeed, perhaps imminent, nobody has the right to withhold unnecessarily any of the quality of our finest heritage while both the picture and the viewer are still alive." If you are the owner or curator, you must decide the fate for the paintings in your care, case by case.

"If you are the owner or curator, you must decide the fate for the paintings in your care, case by case."

FIGURE 9A

FIGURE 9B

FIGURES 9A AND B. Two stages of "unpacking" distinct films from a 19th-century landscape.
FIGURE 9A shows partial removal of a dirt film.
FIGURE 9B shows a fairly direct removal of a soft resin varnish in an "in-progress" stage using traditional solvents.

FIGURES 10, A,B, AND C. Jacob Eichholtz (1776–1842), *Portrait of a Woman*, treated by Richard C. Wolbers at the Winterthur/University of Delaware Program in Art Conservation.

Do you proceed with the cleaning, or do you decide to wait because the artist's paint film might be layered in a problematic way or might be aesthetically compromised? Do you simply change the lighting and the wall coloring or rehang the paintings in relation to one another? Do you ask the conservator to thin the varnish and take into consideration the changes in the pigments, or is this a painting where all varnish may be safely removed and all of the "quality" revealed? You decide.[13]

FIGURE 10A. Before treatment.

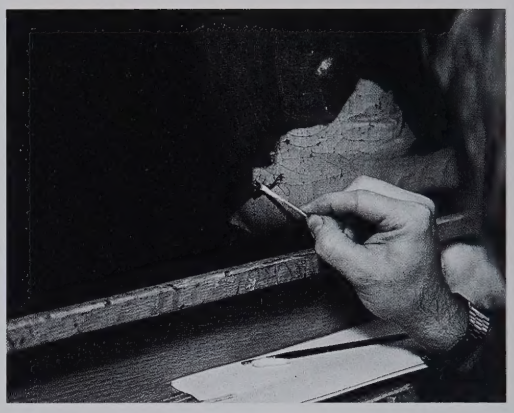

FIGURE 10B. In progress cleaning using lipase.

FIGURE 10C. Detail after treatment.

[13] FAIC oral history archive interviews consulted for this article:
(The released interviews are available to consult in the Winterthur Library, Winterthur, DE 19735 USA)
David Bomford by J. H. Stoner, 15 July 1997
John Brealey by J. H. Stoner, 22 November 1976, 14 January 1977, 20 February 1977
Norman S. Brommelle by Christine Leback [Sitwell], 2 February 1978; by J. H. Stoner, 18 November 1986
David Bull by J. H. Stoner, 20 August 1996 and 22 October 1996
Alexander Dunluce (Lord Antrim) by J. H. Stoner, 19 July 1997
Ernst Gombrich by J. H. Stoner, 24 February 1996
Julius Held by J. H. Stoner, 23 June 1996
Bettina Jessell by J. H. Stoner, 6 August 1996
Herbert Lank by J. H. Stoner, 22 February 1996 + extensive follow-up correspondence
Patrick Lindsay by J. H. Stoner, 6 September 1996 and 21 September, 2000
Mario and Dianne Modestini by J. H. Stoner, 18 March 1996
Paolo and Laura Mora by J. H. Stoner, 16 January 1998
Knut Nicolaus by Stephan Schaefer, 17 March 1996
Paul Philippot by J. H. Stoner, 16 July 1997
Joyce Plesters by Christine Leback [Sitwell], 7 September 1979
Robert Shepherd by J. H. Stoner, 14 July 1997
William Suhr by J. H. Stoner, 20 April 1977
Hubert von Sonnenburg by J. H. Stoner [not released, not quoted], 29 January 1996Christian Wolters by Michael von der Goltz, 6 January 1998
Martin Wyld by J. H. Stoner, 12 January 1998

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STOLEN ART

PAINTINGS

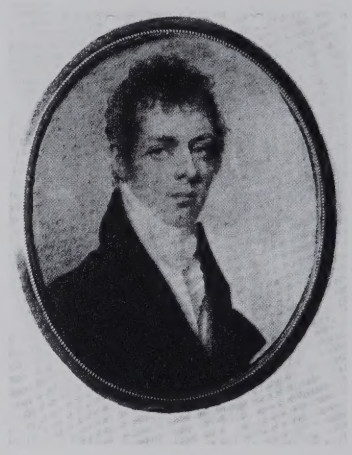
43 FRANCISCO DE GOYA (Spanish, 1746–1828). Oil on panel. 37 x 50 cm. ⋆L02.6855. Stolen from a commercial premises in Switzerland in October 2002.

43

44 PHILIP W. STEER (English, 1860–1942). *Portrait of a Young Woman*. Oil on canvas. Approx. 20" x 16". ⋆L02.6839. Stolen from a private residence in the UK in June 2002.

44

45 ROBERT FIELD (English, d.1819). Miniature portrait of Peter Hall Clarke (1789–1862), 1813. 3.05" x 2.4". Inscribed: Black, Halifax 1811. ⋆N02.122. Stolen from a private residence in Duxbury, MA on April 21, 1977.



45

46 THOMAS BUSH HARDY (English, 1842–97). *Boating Scene*. Oil on canvas. Approx. 30" x 24". ⋆L02.6829. Stolen from a private residence in the UK in February 2002.

46

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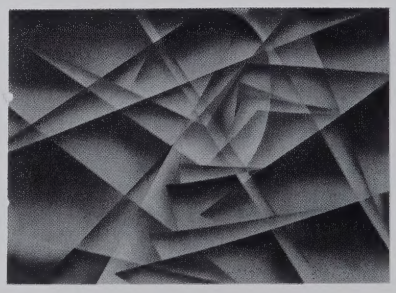
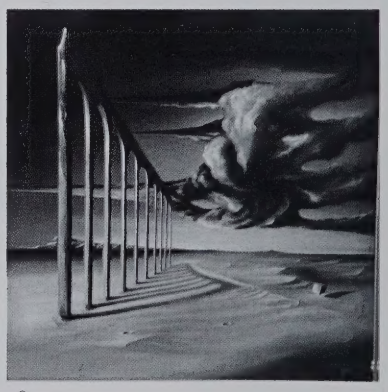
*The following two paintings were stolen from the Los Angeles County Museum of Art Rental and Sales on January 16, 2002 (*N02.98):*

47 MARK BOVILL (20th century). *Fragment Deconstruction*, 1982. Airbrush acrylic on canvas. 60" x 84". Signed verso.



47

48 SLAWEK WISNIEWSKI (20th century). *Tension in the Air*, 1995. Oil on canvas. Signed l/r: S. Wisniewski '95.



48

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*The following two paintings were stolen from a museum in California in early October 2002 (*N02.126):*

49 ALEXEJ VON JAWLENSKY (German, Russian, 1864–1941). *III, Number 27*, 1937. Oil on textured paper. 9 7/8" x 6 15/16".

49

⋆ Numbering for the year 2002 Cumulative Index of Stolen Art began with the previous issue of *IFAR Journal*, Vol. 5, no. 2. Numbering for the year 2002 Cumulative Index of Missing Art begins with this issue.

50

50 ALEXEJ VON JAWLENSKY (German, Russian, 1864–1941). *VIII, Number 7*, 193?. Oil on textured paper. 7 5/16" x 5 3/16".

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*The following two paintings were confiscated from a private collector in the 1960s during the Cuban Revolution (*N02.131):*

51 EDWARDO ABELA (Cuban, 20th century). *La Vaca*, c.1956. Oil on canvas. 50" x 61".

52 CARLOS ENRIQUEZ (Cuban, 20th century). *Los Mambises* or *Bandoleros*, c.1948. Oil canvas. 35" x 27".

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*The following two paintings were stolen from a private foundation in New York in August 2002 (*N02.132). See color photos on inside back cover and story on p. 6.*

53 JACKSON POLLOCK (American, 1912–56). *Panel E*. c.1934–38.

54 JACKSON POLLOCK (American, 1912–56). *Panel F*. c.1934–38.

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55 ALBERT LEBOURG (French, 1849–1928). *Landscape*, 1897. Oil on canvas. ★L02.6903.

56 EDWARD SEAGO (English, 1910–74). *Christmas Roses*. Oil on panel. Signed l/l. Stolen from a private residence in London on October 29, 2002.

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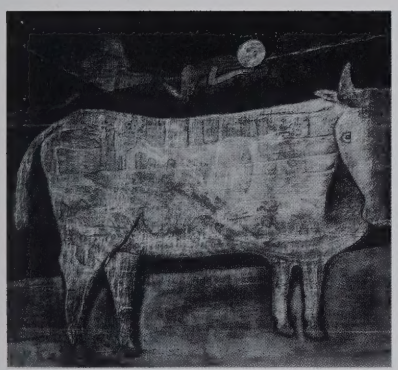
*The following two works were stolen from the Van Gogh Museum in Amsterdam, The Netherlands on December 7, 2002 (*L02.6943). See story on p. 7.*

57 VINCENT VAN GOGH (Dutch 1853–90). *View of the Sea at Scheveningen*, 1882. Oil on canvas.

58 VINCENT VAN GOGH. *Congregation Leaving the Reformed Church in Nuenen*, 1884. Oil on canvas.



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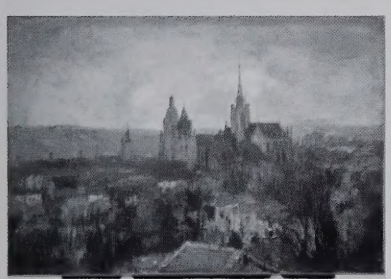

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The following two paintings were stolen from the Skagen Art Museum in Denmark during the weekend of September 14–15, 2002:

59 LAURITS TUXEN (Danish, 1853–1927). *Sunrise over the City of Skagen*, 1905. Oil on panel. 26.7 x 31.5 cm. Signed at bottom: "L.T. Solen Staar op over Skagen by PA Anna Og Mikkels Soelvbryllups DAG 18/8–05."

60 L.A. RING (Danish, 1854–1933). *Village Pond in Baldersbroende*, 1907. Oil on canvas. 41.1 x 43.9 cm. Signed l/l: L.A. Ring 1907.

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*The following two paintings were stolen from a private residence in Naples, Florida in the early morning hours of December 29, 2002 (*N03.19):*

61 PIERRE AUGUSTE RENOIR (French, 1841–1919). *Place de la Trinité*, 1893. Oil on canvas. 21⅜" x 25⅞" (53.8 X 64.6 cm). Signed l/l: Renoir.

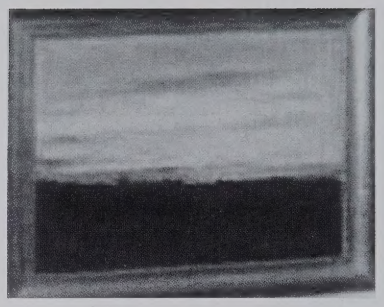
62 CLAUDE MONET (French, 1840–192). *Vétheuil, vu de l'ile Saint-Martin*, 1880. See color photo on inside back cover.

DRAWINGS/WORKS ON PAPER

63 CHERI SHIELDS (English, 20th century). *Gate of Honor, Gonville and Caius*. Watercolor. 9" x 4½". ★N02.112. Stolen from a delivery van in New York City on August 7, 2002.

64 DAVID SMALL (American, 20th century). *Falla*, 2000. Six depictions of Franklin D. Roosevelt's Scottish Terrier. Ink and watercolor. 17" x 23¼". ★N02.118. Stolen from the San Francisco Public Library July 18–19, 2002.

65 WILLEM DE KOONING (Dutch/American, 1904–97). *Untitled (Figures in a Landscape)*, c. 1975. Charcoal on paper. 8 7/16" x 11" (21.4 x 27.9 cm). Stolen from a New York gallery on December 7, 2002. See story on p. 7.



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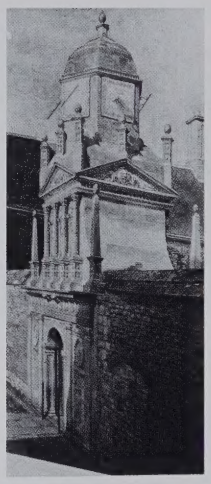

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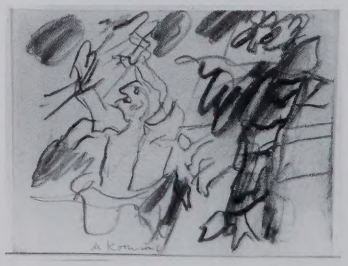

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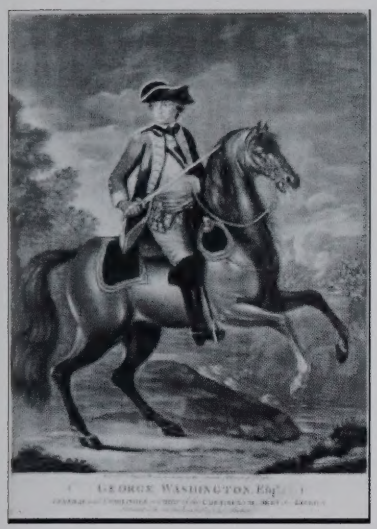

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PRINTS

66 ALEXANDER CAMPBELL (American, 18th century). *George Washington on Horseback*, 1775. Mezzotint painted with gouache. 32 x 25 cm. Written in pencil on back of frame and print: P22522. Stolen from a gallery in Oxfordshire, England on August 29, 2002. Interpol no. 2002/36919–1.

SCULPTURE

*The following two sculptures were confiscated from a private collector in the 1960s during the Cuban Revolution (*N02.131):*

67 ALFREDO LOZANO (Cuban, 20th century). *Figura*. Ht: 11".

68 RAMOS BLANCO, Teodoro (Cuban, 20th century). *Cabeza de Negra*, c.1946. Wood. Ht: 17½".

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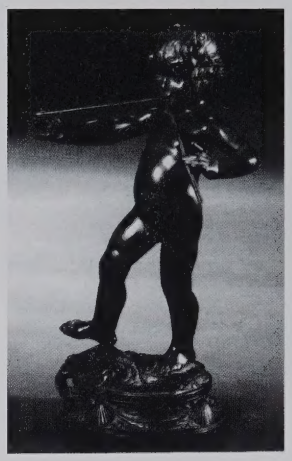
69 *SAINT MARTIN* (Detail) Polychromed wood. ⋆L02.6882. Stolen from a gallery in the Netherlands in September 2002.

70 LUISITO LUJAN (20th century). *Santa Clara*. C.1989–90. Polychrome wood. Ht: 14". ⋆N02.105. Stolen from a corporate collection in Los Angeles on May 28, 2002.

71 *PAN PIPING* Bronze. Ht: 18". ⋆N02.134. Stolen from the reading room of an elementary school in Buffalo, N.Y. sometime during the spring of 2000.

72 JANET SCUDDER (American, 1869–1940). *The Young Pan*, c.1910. Bronze. 14" x 6" x 6". Signed on the base: Janet Scudder and stamped: Gorham Co. Founder QUJ. ⋆N02.115. Stolen from a New York gallery in July 2002.



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ASIAN ART

73 *PHOENIX STAND* (Chinese, Spring and Autumn period, 800 BC). Bronze. Ht: 7". ⋆N02.128. Lost in transit by a New York auction house October 1–2, 2002.

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*The following two items were stolen from a New York gallery on August 7, 2002 (*N02.111):*

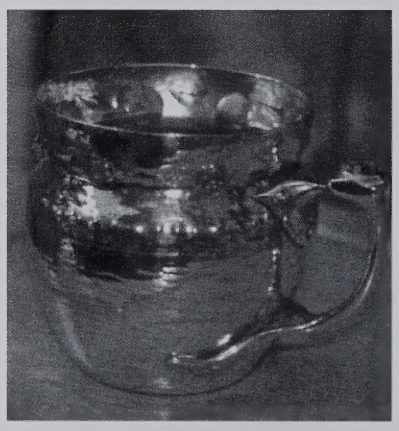
74 *FU VESSEL* (late Eastern Zhou dynasty, 3rd–1st century BC). Bronze. Ht: 29.2 cm. Wt: 3–4 lbs.

74

75 *FOUR LADIES IN WAITING* (7th–century Sui dynasty—early T'ang dynasty). See color photo on inside back cover.

DECORATIVE ARTS/ SILVER

76 LIBERTY & COMPANY LTD. (English). *Drinking/Christening Cup*. Silver with seven opals around the rim. The handle is set with a turquoise cabochon and has a partial hallmark for Birmingham 1900. Ht: 8 cm. ⋆L02.6854. Stolen from a private residence in the UK in June 2002.



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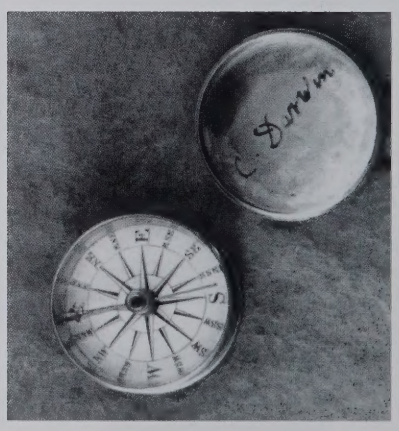
MISCELLANEOUS

77 *COMPASS*. Copper and porcelain. With the signature of Charles Darwin, "C Darwin," inside the detachable lid. Approx. Diam: 3". Stolen from a historical site in Kent, England some time between September 1997 and April 2002.



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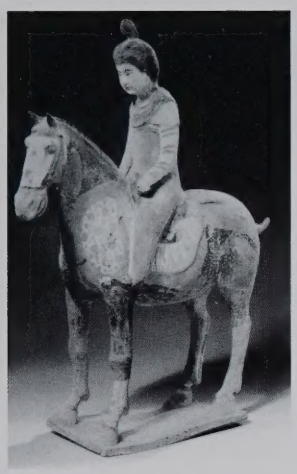

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MISSING ART

ASIAN ART

1 *HORSE AND FEMALE RIDER* (early T'ang dynasty, 618–906 AD). Painted earthenware. 15.7" x 12.5". ⋆N02.137. Lost in transit by a New York art gallery on June 19, 2002.

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*The following five Indian bronzes were among nine lost in transit by a New York gallery sometime in October 2002 (*N02.127):*

2 *UNIDENTIFIED JINA* (Tirthankara) (Gujarat, Valabhi, c.600). 7" x 2½" x 2⅛".

3 *SHRINE OF AN UNIDENTIFIED JINA* (Tirthankara) (Bihar, Bodhgaya, c. 8th century). Pala period. 7¼" x 3⅜" x 2½".

4 *SHRINE OF AN UNIDENTIFIED JINA* (Tirthankara) (Bihar, Bodhgaya, c.9th century). Pala period. 5½" x 2⅞" x 2½".

5 *JINA PARSVANATHA* (Karnataka, c.9th century). 3" x 1⅞" x 1⅜".

6 JINA PARSVANATHA (Maharashtra, Nasik, c.14th century). 1⅝" x ¾" x 4¾".

RECOVERED ART

The following five paintings were stolen on September 24, 2002 from the collection of Alfred Beit, Russborough House, County Wicklow, Ireland and were recovered on December 20, 2002. See story on p.8.

12 PETER PAUL RUBENS (Flemish, 1577–1640). *Portrait of a Dominican Monk*, c.1610. See color photo on inside back cover.

13 PETER PAUL RUBENS (Flemish, 1577–1640). *Venus Supplicating Jupiter.* Oil on canvas. 72.39 x 59.69 cm.

14 ADRIAEN VAN OSTADE (Dutch, 1610–85). *The Adoration of the Shepherds.* Oil on panel. 45.72 x 38.4 cm.

15 ADRIAN VAN DE VELDE (Dutch, 1636–72). *Calm Sea.* Oil on canvas. 38 x 49.5 cm.

16 JACOB SALOMONSZ VAN RUISDAEL (Dutch, c.1629–81). *Cornfield.* Oil on canvas. 46.99 x 62.23 cm. Previously stolen in 1986 and later recovered.

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17 MASTER OF THE POLYPTYCH OF ST. BENEDICT (Italian, early 16th century). *Madonna and Child with Saints.* Oil on panel, partially gilded. Polyptych. Ht: 190 cm. W: 230 cm. Stolen on May 9, 1997 from the Church of St. Benedict, Angri. Listed by the Italian Ministry of Cultural Property as one of the 800 most important works to retrieve. Recovered by the Carabinieri of the Salerno province on September 25, 2002.

18 CHILDE HASSAM (American, 1859–1935.) *White Island Lighthouse*, 1886. Watercolor. 35.3 x 25.7 cm. Stolen on June 7, 1985. Recovered by the ALR in April 2002. See story on p. 10.

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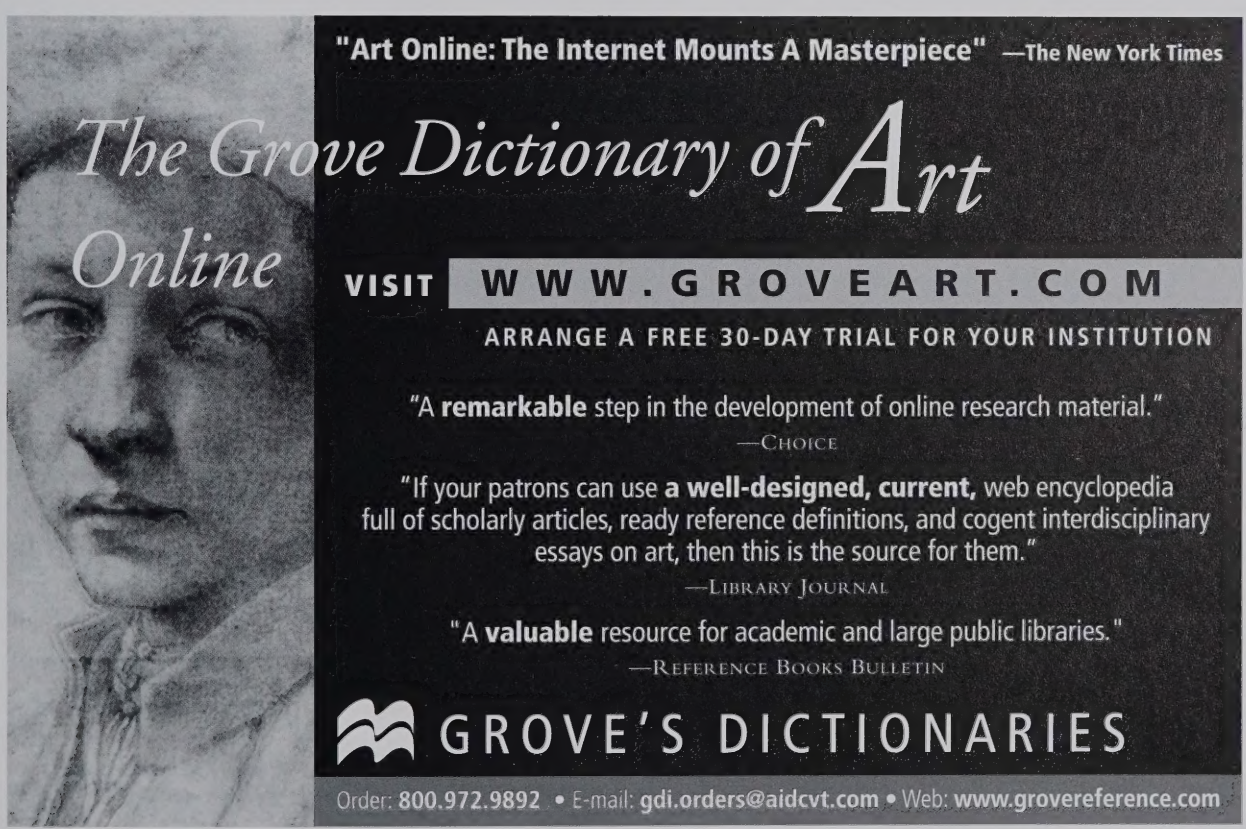
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JULIUS HELD

DIED DECEMBER 22, 2002

INTERNATIONALLY RENOWNED SCHOLAR
SPECIALIST IN DUTCH AND FLEMISH PAINTING

MEMBER OF IFAR'S
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STOLEN ART

The following two paintings were stolen from a warehouse in New York in August 2002 (★N02.132). See story on p. 6 of this issue.

53 JACKSON POLLOCK (American, 1912–56). *Panel E.* c.1934–38. Oil on smooth side of masonite. 7¼" x 6".

54 JACKSON POLLOCK (American, 1912–56). *Panel F.* c.1934–38. Oil on smooth side of masonite. 7⅝" x 6⅜".

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62 CLAUDE MONET (French, 1840–192). *Vétheuil, vu de l'ile Saint-Martin*, 1880. Oil on canvas. 23¾"x 31¼" (60.4 x 79.4cm). Signed and dated l/r: Claude Monet 79. Stolen along with no. 61 (see inside p. 63) from a private residence in Naples, Florida on December 29, 2002.

75 *FOUR LADIES IN WAITING* (7th–century Sui dynasty—early T'ang dynasty). Earthenware, 35.5–37 cm. Each figure is hollow inside. ★N02.111. Stolen from a New York gallery along with no. 74 (see inside p. 64) on August 7, 2002.

RECOVERED ART

12 *PETER PAUL RUBENS* (Flemish, 1577–1640). *Portrait of a Dominican Monk*, c. 1610. Oil on canvas. 58.1 x 45.7 cm. Stolen from Russborough House on September 2, 2002. Recovered on December 20, 2002 along with nos. 13–16 (see inside p. 66 and story on p. 8).

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